DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-1001
Title: Luis Mariano Martinez, Petitioner
v.
Charles L. Ryan, Director, Arizona Department of Corrections
Docketed: February 7, 2011
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (09-15170)
Decision Date: September 27, 2010
Rehearing Denied: November 5, 2010
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Feb 3 2011	Petition for a writ of certiorari filed. (Response due March 9, 2011)
Feb 11 2011	Waiver of right of respondent Charles L. Ryan, Director, Arizona Department of Corrections to respond filed.
Feb 23 2011	DISTRIBUTED for Conference of March 18, 2011.
Mar 7 2011	Response Requested . (Due April 6, 2011)
Apr 6 2011	Brief of respondent Charles L. Ryan, Director, Arizona Department of Corrections in opposition filed.
Apr 18 2011	Reply of petitioner Luis Mariano Martinez filed.
Apr 19 2011	DISTRIBUTED for Conference of May 12, 2011.
May 16 2011	DISTRIBUTED for Conference of May 19, 2011.
May 31 2011	DISTRIBUTED for Conference of June 2, 2011.
Jun 6 2011	Petition GRANTED.
Jun 28 2011	Motion to dispense with printing the joint appendix filed by petitioner Luis Mariano Martinez.
Jul 15 2011	The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 4, 2011.
Jul 15 2011	The time to file respondent's brief on the merits is extended to and including September 6, 2011.
Jul 15 2011	Petitioner is to file any reply brief on the merits on or before September 26, 2011.
Jul 15 2011	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Jul 15 2011	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent..
Jul 19 2011	SET FOR ARGUMENT ON Tuesday, October 4, 2011.
Aug 4 2011	Brief of petitioner Luis Mariano Martinez filed.

Aug 10 2011	CIRCULATED
Aug 11 2011	Brief amicus curiae of American Bar Association filed. (Distributed)
Aug 11 2011	Brief amici curiae of Former State Supreme Court Justices filed. (Distributed)
Aug 11 2011	Brief amicus curiae of Innocence Network filed. (Distributed)
Aug 11 2011	Record received from U.S.C.A. for 9th Circuit. (1 envelope)
Aug 11 2011	Record from U.S.D.C. for the Distict of Arizona is electronic.
Aug 15 2011	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Sep 6 2011	Brief of respondent Charles L. Ryan, Director, Arizona Department of Corrections filed. (Distributed)
Sep 13 2011	Brief amici curiae of Wisconsin, et al. filed. (Distributed)
Sep 13 2011	Brief amicus curiae of the United States filed. (Distributed)
Sep 13 2011	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Sep 13 2011	Brief amicus curiae of Criminal Justice Legal Foundation filed. (Distributed)
Sep 26 2011	Reply of petitioner Luis Mariano Martinez filed. (Distributed)
Sep 27 2011	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 4 2011	Argued. For petitioner: Robert D. Bartels, Tempe, Ariz. For respondent: Kent E. Cattani, Chief Counsel, Criminal Appeals, Phoenix, Ariz.; and Jeffrey B. Wall, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

RECORD
AND
BRIEF

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No. 10- .

IN THE

Supreme Court of the United States

LUIS MARIANO MARTINEZ,

Petitioner,

v.

DORA SCHRIRO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ROBERT BARTELS
Counsel of Record
SANDRA DAY O'CONNOR COLLEGE OF LAW
ARIZONA STATE UNIVERSITY
Tempe, AZ 85287-7906
(480) 965-7053
Robert.Bartels@asu.edu

Attorney for Petitioner

234520

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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QUESTION PRESENTED

Whether a defendant in a state criminal case who is prohibited by state law from raising on direct appeal any claim of ineffective assistance of trial counsel, but who has a state-law right to raise such a claim in a first post-conviction proceeding, has a federal constitutional right to effective assistance of first post-conviction counsel specifically with respect to his ineffective-assistance-of-trial-counsel claim.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF APPENDICES	iv
TABLE OF CITED AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
I. State Court Proceedings	2
A. Evidence Presented at Trial	2
B. State Appellate and Post-Conviction Proceedings	4
II. Federal Habeas Corpus Proceedings	6
III. Basis for Federal Jurisdiction in the Court of First Instance	7

Table of Contents

	Page
ARGUMENT	8
I. Petitioner's Federal Ineffective-Assistance-of-Trial-Counsel Claim is Not Subject to Procedural Default for Two Related Reasons	8
A. The procedural ground on which the state court denied Petitioner's federal claims was not "adequate"	9
B. There is cause and prejudice to excuse any procedural default of Petitioner's ineffective-assistance-of-trial-counsel claims	12
II. The Court of Appeals Misapplied This Court's Decisions In Holding That There Was No Right To Effective Assistance of Counsel on "First-Tier" Review of Ineffective-Assistance-of-Trial-Counsel Claims in Arizona	13
CONCLUSION	22

TABLE OF APPENDICES

Page

APPENDIX A — FOR PUBLICATION OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (SEPTEMBER 27, 2010) 1a

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT (DECEMBER 12, 2008) 26a

APPENDIX C — REPORT AND RECOMMENDATION BY UNITED STATES MAGISTRATE JUDGE (SEPTEMBER 17, 2008) 37a

APPENDIX D — ARIZONA SUPERIOR COURT RULINGS 68a

— ARIZONA SUPERIOR COURT RULING (NOVEMBER 4, 2005) 68a

— ARIZONA SUPERIOR COURT RULING (DECEMBER 1, 2005) 76a

APPENDIX E — UNREPORTED ARIZONA COURT OF APPEALS MEMORANDUM DECISION (AUGUST 31, 2006) 79a

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (NOVEMBER 5, 2010) 84a

TABLE OF CITED AUTHORITIES

Page

CASES

Bonin v. Calderon,
77 F.3d 1155 (9th Cir. 1996) 19

Bonin v. Vasquez,
999 F.2d 425 (9th Cir. 1993) 19, 20

Coleman v. Thompson,
501 U.S. 722 (1991) 8, 9, 10, 12

Douglas v. California,
372 U.S. 353 (1963) ..... *passim*

Edwards v. Carpenter,
529 U.S. 446 (2000) 6

Halbert v. Michigan,
545 U.S. 605 (2005) ..... *passim*

Hoffman v. Arave,
236 F.3d 523 (9th Cir.), cert. denied,
534 U.S. 944 (2001) 9

Martinez v. Schriro,
623 F.3d 731 (9th Cir. 2010) ..... *passim*

Reece v. Georgia,
350 U.S. 85 (1955) 9

Cited Authorities

Page

Ross v. Moffitt,
417 U.S. 600 (1974) ..... *passim*

State v. Spreitz,
202 Ariz. 1, 39 P.3d 525 (2002) 11, 18

Staub v. City of Baxley,
355 U.S. 313 (1958) 9

Strickland v. Washington,
466 U.S. 668 (1984) 11

Wainwright v. Sykes,
433 U.S. 72 (1977) 8

CONSTITUTIONAL PROVISIONS

U.S. Const., Amend. VI 1, 19, 20

U.S. Const., Amend. XIV 1

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2241(a) 6, 7

28 U.S.C. § 2241(c)(3) 7

28 U.S.C. § 2244(d)(1) 21

28 U.S.C. § 2254(a) 6, 7

Cited Authorities

Page

RULES

Sup. Ct. R. 13.1 1

Sup. Ct. R. 13.3 1

Ariz.R.Crim.P. 31.3 15

Ariz.R.Crim.P. 32.1(a)..... 11, 12, 18

Ariz.R.Crim.P. 32.2(a)..... 6

Ariz.R.Crim.P. 32.3..... 18

Ariz.R.Crim.P. 32.4(a)..... 4, 15

Ariz.R.Crim.P. 32.4(c)(2)..... 11, 18

OPINIONS BELOW

The relevant decisions and opinions of the Maricopa County Superior Court, the Arizona Court of Appeals, the Supreme Court of Arizona, United States Magistrate Judge Mark E. Aspey, the United States District Court for the District of Arizona, and the Ninth Circuit Court of Appeals and are reproduced in the Appendix to this Petition. The panel opinion of the Ninth Circuit Court of Appeals is reported as *Martinez v. Schriro*, 623 F.3d 731 (9th Cir. 2010).

JURISDICTION

The Court of Appeals denied rehearing on November 5, 2010. (App. at 84a). This petition is being filed within 90 days after entry of that judgment, pursuant to Supreme Court Rules 13.1 and 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

I. State Court Proceedings

A. Evidence Presented at Trial

1. Petitioner was charged in the state trial court with two counts of sexual conduct with a person under the age of fifteen. 623 F.3d at 733 (App. at 3a). The State's theory was that Petitioner had sexual intercourse with his stepdaughter, Lacey, on two occasions during the morning of July 10, 1999. (Federal Habeas Corpus Petition [hereinafter "Habeas Pet."], District Court DN 1, at 8.)

2. Lacey testified at some length at trial, but she stated that she did not remember much of what had (or had not) happened on July 10, 1999 and for the weeks that followed. (*Id.*). On cross-examination, however, Lacey testified that Petitioner did **not** try to have sex with her or "put his penis up against" her. (*Id.*).

3. Although Lacey's trial testimony did not inculpate Petitioner, the State was permitted to offer testimony that Lacey had made statements prior to trial indicating that Petitioner had rubbed her "private area" and twice had put his "private area" inside her "private area." (*Id.*). On the other hand, there was evidence that Lacey had recanted her accusations against Petitioner during later pretrial conversations with several people. (*Id.*). Lacey's recantations were consistent with Petitioner's exculpatory statements to the police. (*Id.* at 67).

4. The prosecution sought to explain Lacey's recantations primarily by arguing that they were the result of her mother's failure to believe or support Lacey's

initial accusations against Petitioner. (*Id.* at 11]). In this regard, the prosecution relied heavily on expert testimony by a social worker, Wendy Dutton, that "a range of research" indicated that recantations by children of true accusations of sexual abuse most commonly were caused by a "lack of support from the mother of the victim." (*Id.*). Defense counsel did not seek to obtain or present expert testimony to refute Ms. Dutton's opinions, even though such testimony was available. (*Id.* at 12-13).

5. The State presented evidence that a nightgown that Lacey was wearing when the police arrived at the Martinez residence on the morning of July 10, 1999 contained semen stains that matched Petitioner's DNA. (*Id.*). However, the evidence also indicated that it was not possible to determine when the semen had been deposited on the nightgown, that semen still could be found on a garment even after it had been washed, that the extremely low sperm count in the semen samples on the nightgown could have resulted from washing, and that Lacey might have taken her nightgown from a pile of dirty laundry. (*Id.*). Moreover, vaginal swabs collected during a sexual assault examination on the day of the alleged assaults did not contain semen; and the same examination also did not disclose any evidence of injury or trauma on Lacey's body, including her vaginal area. (*Id.*).[1]

6. Petitioner was convicted on both of the counts against him, and he was sentenced to consecutive terms of 35 years to life. 623 F.3d at 733 (App. at 3a).

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1. Trial counsel ineffectively failed to present additional evidence providing an exculpatory explanation for the State's DNA evidence. (*Id.* at 17-19).

B. State Appellate and Post-Conviction Proceedings

1. On direct appeal, Petitioner raised issues that are not relevant to this Petition. The Arizona Court of Appeals affirmed Petitioner's convictions, and the Arizona Supreme Court denied review. *Id.*

2. In May 2002, during the pendency of Petitioner's direct appeal but without his authorization, his court-appointed appellate counsel, Harriette Levitt, filed a Notice of Post-Conviction Relief. *Id.* at 733-34 (App. at 3a-4a). Under Arizona law, a convicted defendant commences a post-conviction relief proceeding by filing a "notice" of post-conviction relief" that does not include the defendant's claims for relief, which are to be stated in a subsequent "petition." *Id.* at 734 (App. at 3a).

3. There was no reason for Ms. Levitt to file a Notice of Post-Conviction Relief before the conclusion of Petitioner's direct appeal.[2] That Ms. Levitt in fact had no such reason became apparent in February 2003, when -- without having communicated with Petitioner's trial counsel, and without Petitioner's consent -- she filed with the state trial court a statement (a) asserting that she had "reviewed the transcripts and trial file and [could] find no colorable claims pursuant to Rule 32" and (b) requesting that the court issue an order granting Petitioner 45 days to file a pro se petition for post-conviction relief. *Id.* (App. at 4a); Habeas Pet. at 35. Ms. Levitt then failed effectively

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2. Under Ariz.R.Crim.P. 32.4(a), a notice of post-conviction relief must be filed "within 30 days after the issuance of the order and mandate in the direct appeal."

to inform Petitioner that he needed to file his own petition,[3] and he did not do so. 623 F.3d at 734 (App. at 4a). On April 28, 2003, the state trial court dismissed the pending post-conviction Notice. *Id.*

4. Represented by new counsel, Petitioner filed a Notice of Post-Conviction Relief in the state trial court on October 18, 2004, and a timely Petition for Post-Conviction Relief on February 7, 2005. *Id.* The Petition alleged that Petitioner's trial counsel was ineffective, in violation of the Sixth and Fourteenth Amendments to the United States Constitution, in several respects including failing to object to Ms. Dutton's expert testimony regarding the alleged victim's recantations, even though that testimony was inadmissible under state law; failing to research the purported basis for Ms. Dutton's testimony or to present readily available expert testimony that Ms. Dutton's testimony was inaccurate and misleading in light of the empirical literature in the field; failing to impeach an important prosecution witness with his own police report; failing to discover or present additional compelling evidence that the alleged victim's initial accusations were false and her subsequent recantations true; and failing to present exculpatory evidence relating the State's DNA evidence. *Id.* (App. at 4a); Habeas Pet. at 10-20, 22-25.[4]

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3. Ms. Levitt's letters to Petitioner were written in English -- even after Petitioner had informed her, in Spanish, that he did not read English and did not "understand anything of what is happening." (Habeas Pet. at 36).

4. Petitioner also argued in the second post-conviction relief proceeding -- in the state trial court, the Arizona Court of Appeals, and the Arizona Supreme Court -- that he had a federal constitutional right to effective assistance of first post-conviction

5. The state trial court dismissed the post-conviction relief Petition without a hearing, finding that Petitioner's claims were "precluded," under Ariz.R.Crim.P. 32.2(a), because Ms. Levitt had not raised those claims in the aborted first post-conviction relief proceeding described above. 623 F.3d at 734 (App. at 5a). The Arizona Court of Appeals granted review but denied relief, solely on the ground that Petitioner's claim was precluded because it could have been raised in the previous post-conviction proceeding. *Id.*; App. at 81a-83a. The Arizona Supreme Court denied review without opinion. 623 F.3d at 734 (App. at 5a).

II. Federal Habeas Corpus Proceedings

1. Petitioner filed a Petition for a Writ of Habeas Corpus on April 24, 2008, pursuant to 28 U.S.C. §§ 2241(a) and 2254(a). *Id.* The Petition asserted the above-referenced federal ineffective-assistance-of-counsel claim, and it argued that the claim was not subject to procedural default because Petitioner had not received the effective assistance of first post-conviction counsel, with respect to his ineffective-assistance-of-counsel claim, to which he was entitled under the United States Constitution. *Id.*; Habeas Pet. at 67-83, 87-94.

2. On December 12, 2008, the District Court issued an Order denying the Petition solely on the ground that Petitioner's claim was procedurally defaulted. 623 F.3d at 734 (App. at 5a).

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counsel with respect to his ineffective-assistance-of-trial-counsel claim, but that Ms. Levitt had performed ineffectively. (Habeas Ex. 4 at 18-19; Habeas Ex. 9 at 5; App. at 8-9; Habeas Ex. 10 at 5-8). Thus, Petitioner exhausted the issue presented in this Petition under *Edwards v. Carpenter*, 529 U.S. 446, 450-51 (2000).

3. After Petitioner filed a timely Notice of Appeal, the District Court issued a Certificate of Appealability with respect to two related issues: "1) whether Arizona's procedural bar, as applied in this case, is an adequate and independent state law ground for denying relief; [and] 2) whether Petitioner has shown cause to excuse his procedural default." *Id.*

4. On September 27, 2010, the Court of Appeals issued a panel Opinion affirming the judgment of the District Court. *Martinez v. Schriro, supra.* The Court of Appeals' ruling was based on its holding that Petitioner did not have a federal right to effective assistance of his first post-conviction relief counsel with regard to his federal ineffective-assistance-of-trial-counsel claim, and that the claim therefore was procedurally defaulted. 623 F.3d at 735-43 (App. at 6a-25a).

5. On October 11, 2010, Petitioner filed a timely Petition for Panel Rehearing and Rehearing En Banc. That Petition was denied on November 5, 2010. (App. at 84a).

III. Basis for Federal Jurisdiction in the Court of First Instance

The District Court had jurisdiction of this habeas corpus action under 28 U.S.C. §§ 2241(a), 2241(c)(3), and 2254(a).

ARGUMENT

The Court of Appeals' dispositive holding that Petitioner did not have a federal right to effective assistance of first post-conviction counsel with respect to any ineffective-assistance-of-trial-counsel claim, even though the first post-conviction proceeding provided the first opportunity for Petitioner to raise such a claim, was contrary to this Court's decisions in *Douglas v. California*, 372 U.S. 353 (1963), and *Halbert v. Michigan*, 545 U.S. 605 (2005).

I. Petitioner's Federal Ineffective-Assistance-of-Trial-Counsel Claim is Not Subject to Procedural Default for Two Related Reasons

As noted above, the state courts denied Petitioner's ineffective-assistance-of-trial-counsel claim on the procedural ground that the claim was not raised in the aborted first post-conviction "proceeding" and therefore was precluded in the second post-conviction proceeding. Petitioner of course agrees with the Court of Appeals, 623 F.3d at 735 (App. at 6a-7a), that a federal habeas corpus court may not reach the merits of a claim which the state courts have denied on a procedural ground if that ground is "adequate and independent," unless the petitioner can demonstrate "cause and prejudice to excuse his default" (or show that failure to reach the merits would "result in a fundamental miscarriage of justice"). *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977). In this case, however, there are two related, but independently sufficient, reasons why Petitioner's ineffective-assistance-of-trial-counsel claim was not procedurally defaulted: (A) the procedural ground

on which the Arizona Court of Appeals denied Petitioner's claim was not "adequate"; and (B) there is cause and prejudice to excuse any "adequate" default.

A. The procedural ground on which the state court denied Petitioner's federal claims was not "adequate"

As the Court of Appeals recognized, a "state procedural rule is not adequate to bar federal review if that 'state procedural rule frustrates the exercise of a federal right.'" 623 F.3d at 742 (App. at 6a) (quoting *Hoffman v. Arave*, 236 F.3d 523, 531 (9th Cir.), *cert. denied*, 534 U.S. 944 (2001)); *see also Staub v. City of Baxley*, 355 U.S. 313, 319-20 (1958); *Reece v. Georgia*, 350 U.S. 85, 88-90 (1955). As the following paragraphs will show, the state courts' procedural ruling in this case -- that Petitioner's federal claims were precluded because of the failure of his first post-conviction counsel to raise them, regardless of whether or not she performed effectively -- was not adequate to prohibit federal-court review because it frustrated the protection of two related federal rights: (a) Petitioner's right to effective assistance of first post-conviction counsel specifically with respect to any ineffective-assistance-of-trial-counsel claim, and (b) Petitioner's underlying right to effective assistance of trial counsel.

1. The "adequacy" argument stated above depends in part on the proposition that Petitioner, as an Arizona defendant, had a federal constitutional right to effective assistance of his first post-conviction counsel, specifically and only with respect to any claim of ineffective assistance of trial counsel. In *Coleman v. Thompson*, this Court

stated the general rule that "there is no right to counsel in state collateral proceedings." 501 U.S. at 755. But this Court then recognized that there might be an exception to that general rule when "state collateral review is the first place a prisoner can present a challenge to his conviction." *Id.* The following paragraphs will demonstrate that there is such an exception, in the specific circumstances of this case, under *Douglas v. California*, 372 U.S. 353 (1963), and *Halbert v. Michigan*, 545 U.S. 605 (2005):

a. The defendant in *Halbert*, after being convicted on a plea of nolo contendere, requested that counsel be appointed to represent him in applying for leave to appeal, but the Michigan courts denied that request. 545 U.S. at 609. This Court, however, held that the due process and equal protection guarantees of the Fourteenth Amendment required "the appointment of counsel for [Michigan] defendants, convicted on their pleas, who [sought] access to first-tier review" -- even though such review was discretionary, rather than of right. *Id.* at 610. This holding was based on this Court's conclusion that *Douglas* -- rather than *Ross v. Moffitt*, 417 U.S. 600 (1974)[5] -- provided "the controlling instruction." 545 U.S. at 616-17. That conclusion in turn was based on two factors: (i) "in determining how to dispose of an application for leave to appeal, Michigan's intermediate appellate court looks to the merits of the claims made in the application"; and (ii) "indigent defendants pursuing first-tier review [i.e., their first available opportunity for review] in the Court of Appeals are generally ill equipped to represent themselves," in part because they (unlike the defendant in *Ross*) have no prior briefing by counsel of relevant issues to present to the reviewing court. *Id.* at 617, 618-22.

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5. *Ross* is discussed in Argument section II, *infra*.

b. The holdings and rationale in *Halbert* and *Douglas* clearly apply to the ineffective-assistance-of-trial-counsel claim in this case. With respect to that claim, the "first tier" of review that was available to Petitioner was a state post-conviction relief petition -- because he was not permitted to raise the claim on direct appeal under Arizona law. *State v. Spreitz*, 202 Ariz. 1, 3, 39 P.3d 525, 527 (2002). Moreover, the two additional *Halbert* factors discussed in the preceding paragraph are fully satisfied here: (i) In deciding how to dispose of ineffective-assistance-of-trial counsel claims raised in a first post-conviction relief proceeding, an Arizona trial court "looks to the merits of the claims"; and (ii) defendants pursuing first-tier review of ineffective-assistance-of-trial-counsel claims have received no prior assistance of counsel, and otherwise are especially "ill equipped to represent themselves," with regard to such claims. Indeed, *Douglas* is even more "controlling" in this case than in *Halbert*: While the "appeal" at issue in *Halbert* was discretionary, an Arizona defendant has a **right** to obtain review of an ineffective-assistance-of-counsel claim on the merits in a timely first post-conviction relief petition. Ariz.R.Crim.P. 32.1(a), 32.4(c)(2).

c. The preceding paragraphs demonstrate that an Arizona defendant pursuing his first opportunity for review of ineffective-assistance-of-trial-counsel claims (necessarily in a Rule 32 post-conviction relief proceeding) has a constitutional right to appointed counsel under *Douglas* and *Halbert*. That means that such a defendant also is entitled to constitutionally **effective** assistance of counsel on such first-tier review. *Strickland v. Washington*, 466 U.S. 668, 684-86 (1984) ("the right to counsel is the right to the effective assistance of counsel").

3. As noted above, when an Arizona defendant is deprived of his federal right to effective assistance of trial counsel, his first and only recourse is to file a petition for post-conviction relief, which he has a right to do under Ariz.R.Crim.P. 32.1(a). Like the defendants in *Douglas* and *Halbert*, however, a defendant is ill-equipped to litigate an ineffective-assistance-of-trial-counsel claim without the assistance of post-conviction counsel -- and such assistance is of little use if it is not effective. Thus, the state courts' ruling that Petitioner's ineffective-assistance-of-trial-counsel claim was "precluded" because his first post-conviction counsel failed to raise it -- regardless of whether or not first post-conviction counsel performed effectively -- frustrated the protection of Petitioner's federal right to effective assistance of trial counsel; and it did so by denying Petitioner's federal right to effective assistance of first-tier-review counsel with respect to ineffective assistance of trial counsel under *Douglas* and *Halbert*.

B. There is cause and prejudice to excuse any procedural default of Petitioner's ineffective-assistance-of-trial-counsel claims

Even if the purely procedural ground for the Arizona Court of Appeals' decision in this case had been adequate and independent, there would be cause and prejudice to excuse the procedural default if Petitioner could show that first post-conviction counsel was **unconstitutionally** ineffective. *Coleman*, 501 U.S. at 753-54 ("Attorney error that constitutes ineffective assistance of counsel is cause"). Argument sections I(A)(1) and (2) have demonstrated that Petitioner did have a federal right to effective assistance of first post-conviction counsel, specifically with respect to his

ineffective-assistance-of-trial-counsel claims; and under *Coleman* a violation of that right constituted cause and prejudice for any procedural default of Petitioner's federal claims in the first post-conviction relief proceedings.

II. The Court of Appeals Misapplied This Court's Decisions In Holding That There Was No Right To Effective Assistance of Counsel On "First-Tier" Review Of Ineffective-Assistance-Of-Trial-Counsel Claims in Arizona

The Court of Appeals' discussion of the holdings in *Douglas*, *Ross*, and *Halbert*, 623 F.3d at 737-39 (App. at 10a-16a), is thorough and accurate, as such. However, the Court of Appeals' application of those holdings to this case, *id.* at 739-42 (App. at 16a-23a), is fundamentally flawed in several respects:

A. The Court of Appeals' analysis of whether this case is controlled by *Douglas* and *Halbert*, or by *Ross*, begins (appropriately) with a critical question: whether Petitioner's first state post-conviction proceeding amounted to "first-tier" review. *Id.* at 740 (App. at 17a). In that regard, the Court of Appeals concludes that "[t]his case is more like *Ross* than *Halbert*":

> Martinez has already received direct review of his conviction and received the assistance of counsel in connection with that appeal. . . . Even if collateral review presents the first tier of review for Martinez' ineffective assistance of [trial] counsel claim, we conclude that Martinez' action is not analogous to a direct appeal -- or

> the **first** opportunity for him to obtain review of his conviction -- so as to entitle him to effective counsel.

Id. (App. at 18a). With respect, this rationale is neither consistent with the holdings and reasoning in *Douglas* and *Halbert* nor supported by *Ross*:

1. As the above-quoted passage from the Court of Appeals' opinion recognizes, the fact that Petitioner was **prohibited** from raising his ineffective-assistance claim in his "direct appeal" from his conviction meant that the first post-conviction proceeding was "the first tier of review" for that claim; and with respect to that claim, Petitioner certainly had not "already received the assistance of counsel in connection with that first appeal." Thus, for Petitioner's ineffective-assistance claim the first post-conviction proceeding fully implicated the "first tier" due process and equal protection concerns that underlay *Douglas* and *Halbert*.

2. The foregoing effectively suggests how clearly *Ross* is distinguishable from this case. In *Ross*, the discretionary review proceedings in which the defendant sought appointed counsel necessarily were restricted to claims that the defendant already had litigated in the state court of appeals -- with appointed counsel. 417 U.S. at 603-604. Thus, those discretionary review proceedings provided second (or third) tier review for all of Moffitt's claims; and Moffitt -- unlike Petitioner -- really **had** "already received the assistance of counsel" for those claims.[6]

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6. In *Douglas*, this Court noted that it was not concerned with the right to counsel "for the preparation of a petition for discretionary or mandatory review beyond the stage in the

3. The Court of Appeals' flawed reasoning regarding "first tier" review implies that if an Arizona defendant filed a notice and petition for post-conviction relief alleging ineffective assistance of trial counsel before he filed a notice of direct appeal [as he could under Ariz.R.Crim.P. 31.3 and 32.4(a)], he would be entitled to effective assistance of counsel in the post-conviction proceedings -- but not with respect to any issues that had to be raised on direct appeal. Such a result would make no sense in terms of the holdings in *Douglas* and *Halbert* (and *Ross*).

4. The Court of Appeals' position regarding "first tier" review also would mean that the State could deprive a defendant of his right to effective assistance of counsel with respect to first-tier review of any federal constitutional claim simply by (i) restricting direct appeal to state-law errors and (ii) requiring all federal errors to be raised by means of a "post-conviction" petition. Such a result would not be consistent with the holdings in *Douglas* and *Halbert*, or with *Halbert*'s explicit statement that the right to counsel on first-tier review is not dependent on whether such review is labelled an "appeal." 545 U.S. at 619.

B. With respect to Petitioner's argument that a pro se defendant is "ill equipped" to represent himself in the proceeding that provides the first opportunity to raise and litigate an ineffective-assistance-of-trial counsel claim, the Court of Appeals' reasoning is that

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appellate process at which the claims have once been presented by a lawyer and passed upon by an appellate court." 372 U.S. at 356 (emphasis added). And in *Ross*, this Court stated that the State had a duty "only to assure [that an] indigent defendant [had] an adequate opportunity to present his claims fairly in the context

> Martinez faces a lesser handicap in pursuing collateral review than a defendant pursuing a first appeal, as in *Douglas* and *Halbert*. Martinez has already received the assistance of appellate counsel in a prior proceeding, like the petitioner in *Ross*.
>
> . . . . A defendant seeking second-tier review will have received the assistance of counsel in connection with direct review, and would have "at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case."

623 F.3d at 741 (App. at 19a) (quoting *Ross*, 417 U.S. at 615). The above-quoted statements of course are true when "collateral" review involves the same claims as a prior direct appeal -- but they do not apply at all to this case, in which the first post-conviction proceeding was, as a matter of state law, Petitioner's first opportunity to raise an ineffective-assistance-of-trial-counsel claim:

1. The "assistance of appellate counsel in a prior proceeding" that Petitioner received (on direct appeal) could not have had anything to do with any ineffective-assistance-of-trial-counsel claim, since such claims were prohibited on direct appeal. Similarly, neither the "brief on his behalf in the [Arizona] Court of Appeals" nor any "opinion by the Court of Appeals disposing of his case" on direct appeal could have involved any claim of ineffective assistance of trial counsel.

2. A "transcript or other record of trial proceedings" would be inadequate to evaluate the effectiveness of trial counsel, which often depends on what trial counsel did (or did not do) outside the record.

3. Given the purpose of the right to effective assistance of counsel, a defendant obviously is especially ill equipped to represent himself with respect to an ineffective-assistance claim.

C. With regard to Petitioner's argument that his case satisfies *Halbert*'s second factor regarding first-tier review because an Arizona trial court considering an ineffective-assistance claim in a first post-conviction proceeding must "look to the merits" of the claim, the Court of Appeals points out that *Douglas* and *Halbert* both involved discretionary review proceedings in which the reviewing courts looked to the merits of the defendants' claims in performing a "gatekeeping" function. 623 F.3d at 741 (App. at 20a). But that point does nothing to counter Petitioner's argument or distinguish *Douglas* and *Halbert*: In both of those decisions, this Court's point was that **even though** the reviewing courts were performing a gatekeeping function, they looked to the merits in doing so. 372 U.S. at 354-57; 545 U.S. at 612, 617-19. The fact that an Arizona trial court presented with an ineffective assistance claim in a first post-conviction proceeding has no gatekeeping function, but instead must address the merits directly, makes *Douglas* even more clearly controlling in this case than in *Halbert*.[7]

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7. Moreover, it does not matter that "there is no impediment to the first tier of **appeal**," 623 F.3d at 741 (App. at 20a) (emphasis added) -- because Petitioner was prohibited from raising any ineffective-assistance claim on direct appeal.

D. The preceding paragraph effectively demonstrates why it is not relevant that

> discretionary appeal to a state Supreme Court or to the United States Supreme Court is not intended to correct error in individual cases, but rather to address questions of public importance, critical issues of law, conflicts in the decisions of relevant courts, and so forth.

623 F.3d at 741 (App. at 21a). In a first post-conviction proceeding, an Arizona trial court has no discretion whether to rule on an ineffective-assistance claims based on considerations of public importance (or anything else); and contrary to the Court of Appeals' suggestion, *id.* at 742 (App. at 21a), with respect to such claims the Arizona trial courts do perform an "error correction function" -- under *State v. Spreitz*, *supra*, and Ariz. R. Crim. P. 32.1(a) and 32.4(c)(2) -- that is precisely "analogous to an appellate court hearing a criminal defendant's direct appeal as of right."[8]

E. With regard to the Court of Appeals' "return" to *Douglas* and its due process and equal protection rationales, 623 F.3d at 742 (App. at 21a-22a), it suffices to point out that every reason that the Court of Appeals offers for not applying due process and equal protection

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8. In the Arizona context, the Court of Appeals also is incorrect in asserting that post-conviction relief "is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature," 623 F.3d at 742 (App. at 21a): Rule 32.3 of the Arizona Rules of Criminal Procedure specifically provides that a post-conviction relief proceeding "is part of the original criminal action and not a separate action."

principles to this case would apply equally to *Douglas* and *Halbert* -- in both of which this Court found those principles to be applicable. 372 U.S. at 355-57; 545 U.S. at 610.[9]

F. The Court of Appeals' discussion of Petitioner's argument for a very specific "exception to the general rule that there is no right to counsel in collateral review" concludes with the proposition that "this exception would swallow the general rule." 623 F.3d at 742 (App. at 23a). While this statement is cryptic, it is supported by a citation to *Bonin v. Calderon*, 77 F.3d 1155, 1160 (9th Cir. 1996) [*Bonin III*] -- which in turn cites to *Bonin v. Vasquez*, 999 F.2d 425 (9th Cir. 1993) [*Bonin I*], in which the Court of Appeals offered the following rationale:

> The actual impact of such an exception would be the likelihood of an infinite continuum of litigation in many criminal cases. If a petitioner has a Sixth Amendment right to competent counsel in his or her first state postconviction proceeding because that is the first forum in which the ineffectiveness of trial counsel can be alleged, it follows that the petitioner has a Sixth Amendment right to counsel in the second state postconviction proceeding, for that is the first forum in which he or she can raise a challenge based on counsel's performance in the first state postconviction proceeding. Furthermore,

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9. Petitioner respectfully disagrees with the Court of Appeals' statement that "Martinez advances no argument grounded in the rationale of equal protection," 623 F.3d at 742 (App. at 22a): In relying on *Douglas* and *Halbert*, Petitioner necessarily has been relying on their due process and equal protection rationales.

> because the petitioner's first federal habeas petition will present the first opportunity to raise the ineffective assistance of counsel in the second state post-conviction proceeding, it follows logically that the petitioner has a Sixth Amendment right to counsel in the first federal habeas proceeding as well. And so it would go. Because any Sixth Amendment violation constitutes cause, . . . federal courts would never be able to avoid reaching the merits of any ineffective-assistance claim, regardless of the nature of the proceeding in which counsel's competence is alleged to have been defective. As a result, the "exception" would swallow the rule.

Id. at 430. While the Court of Appeals' apparent concern about the likelihood of an "infinite continuum of litigation" is understandable in the abstract, it is misplaced in this case, for the following independently sufficient reasons:

1. On a theoretical level: While it would appear that a challenge (in a second post-conviction proceeding) to the effectiveness of first post-conviction counsel with respect to an ineffective-assistance-of-trial-counsel claim would constitute first-tier review, in fact that is not the case -- because any review of the effectiveness of first post-conviction counsel necessarily would require second-tier review of the effectiveness of trial counsel[10] (which would be covered by *Ross*, rather than *Douglas*

10. First post-conviction counsel could not be ineffective with regard to an ineffective-assistance-of-trial-counsel claim unless that claim was valid.

and *Halbert*). Thus, the "continuum" would end after one tier (in Arizona, the first post-conviction proceeding).[11]

2. On a practical level: It is highly unlikely that a potential habeas petitioner could work his way through several tiers of state post-conviction review without running afoul of the one-year statute of limitation for federal habeas cases, 28 U.S.C. § 2244(d)(1).

3. Even if there was a likelihood that there would be some habeas cases involving multi-level ineffective-assistance claims, that would not justify denying the constitutional right to first-tier-review counsel recognized in *Douglas* and *Halbert*. In effect, the Court of Appeals' decision says that a state criminal defendant has an abstract right to effective assistance of trial counsel -- but that if he is deprived of that right, he has no federal right to an effective remedy.

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11. This does not mean that a defendant (like Petitioner) could not challenge the effectiveness of first post-conviction counsel in a second post-conviction proceeding; but it does mean that the defendant would have no federal right to counsel in the second post-conviction proceeding, or in any subsequent federal habeas proceeding.

CONCLUSION

This Petition has not addressed the merits of Petitioner's ineffective-assistance-of-trial-counsel and ineffective-assistance-of-first-post-conviction-counsel claims, because neither the Court of Appeals nor the District Court did so. Thus, this Court should grant this Petition, reverse the judgment of the Court of Appeals, and remand with direction to consider the merits of Petitioner's interdependent ineffective-assistance claims.

Respectfully submitted,

ROBERT BARTELS
Counsel of Record
SANDRA DAY O'CONNOR
COLLEGE OF LAW
ARIZONA STATE UNIVERSITY
Tempe, AZ 85287-7906
(480) 965-7053
Robert.Bartels@asu.edu

Attorney for Petitioner

APPENDIX

APPENDIX A — FOR PUBLICATION
OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
(SEPTEMBER 27, 2010)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-15170

D.C. No. 2:08-cv-00785-JAT

LUIS MARIANO MARTINEZ,

Petitioner-Appellant,

v.

DORA SCHRIRO,
Director of the Arizona Department of Corrections,

Respondent-Appellee.

Appeal from the United States District Court
for the District of Arizona
James A. Teilborg, District Judge, Presiding

Argued and Submitted
January 11, 2010—San Francisco, California

Filed September 27, 2010

Before: J. Clifford Wallace, Procter Hug, Jr. and
Richard R. Clifton, Circuit Judges.

Appendix A

Opinion by Judge Wallace

COUNSEL

Robert Bartels, Esq., Tempe, Arizona, for petitioner-appellant Luis Mariano Martinez.

John P. Todd, Esq., Deputy State Attorney General, Phoenix, Arizona, for respondents-appellees Dora Schriro, et al.

OPINION

WALLACE, Senior Circuit Judge:

Martinez, a prisoner in the custody of the Arizona Department of Corrections, petitioned for a writ of habeas corpus. Martinez alleges that he received ineffective assistance of counsel at trial, but that his state-appointed appellate counsel failed to raise this claim in the first state post-conviction relief proceeding brought on his behalf. Martinez asserts a federal constitutional right to the effective assistance of counsel in connection with his state proceeding. He contends that the right of an indigent defendant to the assistance of appellate counsel is fundamentally a right to counsel in connection with the presentation of a claim of error at the first tier of review. Collateral review presented the first opportunity, under Arizona law, at which Martinez could assert an ineffective-assistance-of-trial-counsel claim. Martinez therefore reasons that he has a right to the effective assistance of counsel in the first post-conviction relief proceeding in

which he could present a claim of ineffective assistance by his trial counsel.

The district court had jurisdiction over Martinez' habeas petition pursuant to 28 U.S.C. §§ 2241(a) and 2254(a). The district court denied the petition on the basis that it was procedurally defaulted. We have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253(a). We affirm.

I.

Martinez is serving two consecutive terms of 35 years to life, following his conviction for two counts of sexual conduct with a person under the age of fifteen. With the assistance of state-appointed counsel, Martinez pursued a direct appeal of his conviction. The Arizona Court of Appeals affirmed Martinez' conviction, and the Arizona Supreme Court denied review. On direct appeal, Martinez raised issues that are not pertinent to our review of his federal habeas petition.

In May 2002, during the pendency of his direct appeal, Martinez' state-appointed appellate counsel initiated an Arizona post-conviction relief proceeding on his behalf, pursuant to Arizona Rule of Criminal Procedure 32.4.a, pursuant to which a convicted defendant commences collateral review by filing a "Notice of Post-Conviction Relief." The defendant's claims are to be stated in a subsequent "petition." *See* Ariz. R. Crim. Pro. 32.4.c(2), 32.5; Ariz. R. Crim. Pro. Form 24(b). Martinez asserts that his counsel filed the Notice of Post-Conviction Relief, thereby initiating Rule 32 post-conviction relief

proceedings, without prior notice to him and without his authorization.

Martinez' counsel thereafter filed a statement in the Rule 32 action asserting that she had "reviewed the transcripts and trial file and [could] find no colorable claims pursuant to Rule 32." *Cf. State v. Smith*, 184 Ariz. 456, 910 P.2d 1, 4 (Ariz. 1996) (explaining that if "after conscientiously searching the record for error, appointed counsel in a [post-conviction relief] proceeding finds no tenable issue and cannot proceed, the defendant is entitled to file a pro per PCR," and counsel must so notify the court and the client). In this same statement, counsel requested that the court grant Martinez 45 days in which to file a pro se petition in support of post-conviction relief. Martinez alleges that his counsel filed this statement without prior notice to him and without his consent. He alleges that his counsel also failed to advise him that he needed to file a pro se petition. Martinez alleges that he did not file a petition because his counsel "failed effectively to inform Petitioner that he needed to file his own petition." On April 28, 2003, after time had expired for Martinez to file a petition, the trial court dismissed the Rule 32 action for post-conviction relief.

On October 18, 2004, represented by new counsel, Martinez filed a second "Notice of Post-Conviction Relief" in Arizona Superior Court. Martinez filed a timely supporting petition on February 7, 2005. This petition alleged that Martinez' trial counsel was ineffective in several respects, amounting to ineffective assistance of counsel in violation of his Sixth and Fourteenth Amendment constitutional rights.

Appendix A

The Arizona Superior Court dismissed Martinez' second action for post-conviction relief as "precluded" under Arizona Rule of Criminal Procedure 32.2.a and also as without merit. Arizona Rule of Criminal Procedure 32.2.a(3) precludes a defendant from receiving relief based upon any ground that, *inter alia*, "has been waived at trial, on appeal, or in any previous collateral proceeding." In effect, the Arizona Superior Court deemed Martinez' claims to be procedurally defaulted because he had failed to raise them in his first Rule 32 action for post-conviction relief. Martinez sought review in the Arizona Court of Appeals. That court granted review, but denied relief to Martinez on the basis that his claims were precluded. Martinez sought further review by the Arizona Supreme Court, which denied review without opinion.

Having exhausted the avenues of relief available in state court, Martinez turned to the federal court. On April 24, 2008, he filed the present action, petitioning for a writ of habeas corpus pursuant to 28 U.S.C. §§ 2241(a) and 2254(a). Martinez' federal petition again asserted an ineffective-assistance-of-trial-counsel claim. The district court denied Martinez' petition as procedurally defaulted. The district court issued a certificate of appealability, however, with respect to two related issues: "1) whether Arizona's procedural bar, as applied to this case, is an adequate and independent state law ground for denying relief; [and] 2) whether Petitioner has shown cause to excuse his procedural default."

Appendix A

II.

Martinez' habeas petition is governed by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). When reviewing a petition for a writ of habeas corpus, federal courts "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991); *see also Thomas v. Goldsmith*, 979 F.2d 746, 749 (9th Cir. 1992). This rule applies to both substantive and procedural state law grounds. *Coleman*, 501 U.S. at 729. The state law ground at issue in this case is procedural.

In order to bar federal review, the state procedural rule "must have been firmly established and regularly followed" at the time of the purported procedural default. *Fields v. Calderon*, 125 F.3d 757, 760 (9th Cir. 1997), *quoting Ford v. Georgia*, 498 U.S. 411, 424, 111 S. Ct. 850, 112 L. Ed. 2d 935 (1991) (internal quotation marks and citation omitted); *see also Wells v. Maass*, 28 F.3d 1005, 1010 (9th Cir. 1994) (state procedural bar "must be clear, consistently applied, and well-established at the time of the petitioner's purported default"). A state procedural rule may be "inadequate" to preclude federal review, however, if it frustrates the exercise of a federal right. *See Hoffman v. Arave*, 236 F.3d 523, 531 (9th Cir.), *cert. denied*, 534 U.S. 944, 122 S. Ct. 323, 151 L. Ed. 2d 241 (2001).

Where a habeas petitioner "has defaulted his federal claims in state court pursuant to an independent and

adequate state procedural rule," the federal courts may not review the petition, "unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. To establish cause for a procedural default, a petitioner must show that the default was due to an "objective factor" that was "external" to him and could not "fairly be attributed to him." *Id.* at 753; *see also Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986) (petitioner must show "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule").

We review the district court's denial of Martinez' petition for writ of habeas corpus de novo. *Leavitt v. Arave*, 383 F.3d 809, 815 (9th Cir. 2004).

III.

The Arizona Court of Appeals concluded that Martinez' ineffective-assistance-of-trial-counsel claim was procedurally defaulted by application of Arizona Rule of Criminal Procedure 32.2, which provides that a

> defendant shall be precluded from relief under this rule based upon any ground:
>
> (1) Raiseable on direct appeal under Rule 31 or on post-trial motion under Rule 24; (2) Finally adjudicated on the

> merits on appeal or in any previous collateral proceeding; (3) That has been waived at trial, on appeal, or in any previous collateral proceeding.

Ariz. R. Crim. Pro. 32.2. The district court concluded that this state procedural rule was an "adequate and independent" basis to bar federal habeas corpus review, and that there was not cause and prejudice to excuse the default.

Martinez argues that the state procedural rule is not "adequate and independent" to bar federal review because it would frustrate the exercise of his federal constitutional right to the effective assistance of counsel. He alleges that the performance of his appellate counsel was constitutionally ineffective in connection with his first Rule 32 action. He contends that the Arizona Court of Appeals ignored the inadequacy of his appellate counsel, and that application of Arizona Rule of Criminal Procedure 32.2.a frustrated his federal constitutional right to the effective assistance of counsel.

Martinez' allegation of ineffective assistance of appellate counsel is central to this appeal. This allegation underpins Martinez' arguments as to both procedural default and "cause and prejudice." The ineffectiveness of appellate counsel, however, is a relevant and cognizable consideration in this appeal only if Martinez possessed a federal constitutional right to the assistance of counsel in the relevant proceeding for collateral review.

Appendix A

A.

The Supreme Court has never recognized a federal constitutional right to the assistance of counsel in collateral review proceedings. *Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987) ("We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions"), *citing Johnson v. Avery*, 393 U.S. 483, 488, 89 S. Ct. 747, 21 L. Ed. 2d 718 (1969); *see also Coleman*, 501 U.S. at 755; *Murray v. Giarratano*, 492 U.S. 1, 7-8, 109 S. Ct. 2765, 106 L. Ed. 2d 1 (1989). In several cases, we have concluded that there is no federal constitutional right to counsel in collateral proceedings, even where those post-conviction proceedings constitute the first opportunity for a criminal defendant to present an ineffective assistance of counsel claim. *See Ellis v. Armenakis*, 222 F.3d 627, 633 (9th Cir. 2000) (holding there is "no constitutional right to counsel during state habeas proceedings even if that was the first forum in which a defendant could challenge the constitutional competence of counsel"); *Bonin v. Calderon*, 77 F.3d 1155, 1159 (9th Cir.), *cert. denied*, 516 U.S. 1143, 116 S. Ct. 980, 133 L. Ed. 2d 899 (1996); *Jeffers v. Lewis*, 68 F.3d 299, 300 (9th Cir.) (en banc), *cert. denied*, 515 U.S. 1187, 116 S. Ct. 36, 132 L. Ed. 2d 917 (1995); *Bonin v. Vasquez*, 999 F.2d 425, 429 (9th Cir. 1993).

In this case, nevertheless, Martinez asserts that he is entitled to the effective assistance of counsel in connection with his first state petition for post-conviction relief. He asserts that a right to the assistance of counsel attaches to the presentation of a claim of error at the first tier of

review, relying upon *Halbert v. Michigan*, 545 U.S. 605, 125 S. Ct. 2582, 162 L. Ed. 2d 552 (2005) and *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963). Martinez recognizes the general rule that "there is no right to counsel in state collateral proceedings," see *Coleman*, 501 U.S. at 755, but asserts that there might be an exception where "state collateral review is the first place a prisoner can present a challenge to his conviction." 501 U.S. at 755.

We begin by reviewing the cases that frame our decision. On the one hand, the Court's decisions in *Halbert and Douglas* recognized a federal constitutional right to counsel in connection with a criminal defendant's direct appeal from his conviction (or the equivalent of direct appeal). On the other hand, in *Ross v. Moffitt*, the Court declined to recognize a right to counsel in connection with a criminal defendant's pursuit of second-tier review. 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974).

1.

In *Douglas*, the Court recognized the right of an indigent criminal defendant to the assistance of counsel in his first appeal as of right in state court. 372 U.S. at 355-56; *see also Evitts v. Lucey*, 469 U.S. 387, 396, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985). The petitioners in Douglas were two indigent defendants who had been jointly tried and convicted in California. 372 U.S. at 353-54. They requested, but were denied, the assistance of counsel on appeal. *Id.* at 354. Under a California procedural rule, the state intermediate appellate courts, upon

receiving a indigent's request for counsel, would make an independent investigation of the record and determine if the appointment of counsel would benefit the defendant or the courts. *Id.* at 354-55. Under California's system, in the Court's estimation, the type of appeal available to a criminal defendant hinged upon whether or not he could afford counsel. If he could not, his case was subjected to ex parte review on the merits without benefit of any argument by counsel. *Id.* at 355-56. The appellate court would "prejudge the merits before it can even determine whether counsel should be provided." *Id.* at 356. By contrast, a criminal defendant who could afford counsel was "not faced with the preliminary 'ex parte examination of the record,' but had their arguments presented to the court in fully briefed form." *Ross*, 417 U.S. at 608, *citing Douglas*, 372 U.S. at 356.

Douglas concluded that this was not a fair procedure: "When an indigent is forced to run this gantlet [sic] of a preliminary showing of merit, the right to appeal does not comport with fair procedure." 372 U.S. at 357. In addition, the Court determined that equal protection was being denied to the poor: "where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, . . . an unconstitutional line has been drawn between rich and poor." *Id. Douglas* dealt only with a defendant's first state appeal as a matter of right and did not concern the appointment of counsel "for the preparation of a petition for discretionary or mandatory review beyond the stage in the appellate process at which the claims have once been presented by a lawyer and passed upon by an appellate court." *Id.* at 356. In later

cases, the Court returned to consider these unanswered questions.

In *Ross*, the Court declined to extend the right to counsel beyond a defendant's first appeal from his criminal conviction. 417 U.S. at 618. In that case, the petitioners sought the appointment of counsel for a second-tier discretionary appeal to a state Supreme Court (there, North Carolina) and for certiorari review to the Supreme Court. *Id.* at 604. The Court held that counsel need not be appointed for indigent defendants pursuing discretionary appeals where those defendants had been provided with appointed counsel in their first appeal.

In *Ross*, the Court recognized that *Douglas* appeared to invoke both the fundamental fairness requirement of the Due Process Clause and the Fourteenth Amendment's equal protection guarantee. But *Ross* did not put much stock in the due process rationale, observing that "there are significant differences between the trial and appellate stages of a criminal proceeding." *Id.* at 610. The purpose of trial "is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt," while in the appellate process, a defendant seeks "not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilty made by a judge or a jury below." *Id.* This difference is significant because, while a state may not dispense with the trial stage without a defendant's consent, the state "need not provide any appeal at all." *Id.* at 611. Because of these differences, the Court reasoned, the question at issue was more "profitably considered under an equal protection analysis." *Id.*

Turning to the equal protection issue, the Court determined that unfairness would result only "if indigents are singled out by the State and denied meaningful access to the appellate system because of their poverty." *Id.* The Fourteenth Amendment "does not require absolute equality or precisely equal advantages." *Id.* at 612, *citing San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 24, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973). The state has no duty to duplicate "the legal arsenal that may be privately retained by a criminal defendant . . . but only to assure [that an] indigent defendant [had] an adequate opportunity to present his claims fairly in the context of the State's appellate process." *Id.* at 616. The Court concluded that an indigent defendant was not denied "meaningful" access to the state Supreme Court simply because the state did not appoint counsel to assist him in seeking discretionary review. *Id.* at 615. At the stage of a second-tier appeal, the criminal defendant would have already received the assistance of counsel in connection with his first appeal. *Id.* at 615, 616-17. Counsel's work, supplemented by a defendant's pro se submissions, would provide the state Supreme Court "with an adequate basis for its decision to grant or deny review." *Id.* An indigent was thus less handicapped by the denial of counsel for a discretionary appeal than by the denial of counsel for an initial appeal as of right, as considered in *Douglas. Ross*, 417 U.S. at 616.

This conclusion was reinforced by looking to the role of the North Carolina Supreme Court and the United States Supreme Court. *Id.* at 615. The North Carolina Supreme Court did not sit to correct the adjudication of guilt in individual cases, but rather reviewed cases where

"the subject matter of the appeal [had] significant public interest, . . . the cause involves legal principles of major significance . . . , or . . . the decision below [was] in probable conflict" with another decision of the court. *Id.* (internal citations and quotation marks omitted). Likewise, review by the United States Supreme Court "is discretionary and depends on numerous factors other than the perceived correctness of the judgment [the Court] is asked to review." *Id.* at 616-17. In sum, the Court concluded that the Constitution did not require the appointment of counsel to an indigent defendant seeking second-tier review or other discretionary review. The Court stressed that the right to the assistance of counsel on appeal extended only to a first appeal.

2.

In *Halbert*, the Court evaluated the right to counsel in the context of a Michigan law providing that criminal defendants, if convicted by plea, could obtain review of their convictions only by discretionary appeal. 545 U.S. at 609. The Michigan law at issue provided that "an appeal by an accused who pleads guilty or nolo contendere shall be by the leave of the court." *Id.*, *citing* Mich. Const., art. 1 § 20. Pursuant to this law, "several Michigan state judges began to deny appointed appellate counsel to indigents convicted by plea." *Id.* (internal quotation marks and citation omitted). Halbert was indigent and had been convicted of second-degree criminal sexual conduct pursuant to his plea of nolo contendere. *Id.* at 609, 614. He requested the appointment of counsel to apply for leave to appeal his conviction. *Id.* at 609. The state trial court and

intermediate appellate court denied Halbert's request; the Michigan Supreme Court denied review. *Id.*

Halbert's appeal was framed by *Douglas* and *Ross*, and *Halbert* characterized the issue before it as "essentially one of classification: With which of those decisions should the instant case be aligned?" *Halbert*, 545 U.S. at 616. The Court determined that the case was governed by *Douglas*, highlighting two reasons for its conclusion. *Id.* at 616-17. First, in deciding whether to grant leave to appeal, the Michigan Court of Appeals looked to the merits of the claim as set forth in an application for leave to appeal. *Id.* at 617. Thus, like the petitioners in *Douglas*, Halbert's appeal was subject to ex parte review without benefit of counsel's argument, and, although the appeal was "discretionary," the Michigan Court of Appeals sat in an "error-correction instance," and not as the Michigan Supreme Court. *Id.* at 617-620. Second, the Court explained that "indigent defendants pursuing first-tier review in the Court of Appeals are generally ill equipped to represent themselves," and without the assistance of counsel in preparing an application for leave to appeal, an indigent defendant would be "disarmed in [his] endeavor to gain first-tier review." *Id.* at 617-18. Because a plea-convicted defendant was only afforded the opportunity for review by discretionary appeal, that discretionary appeal was the first, and likely the only, direct review the defendant's conviction and sentence would receive. *Id.* at 619. The Court concluded that review of an application for leave to appeal therefore "rank[ed] as a first-tier appellate proceeding requiring the appointment of counsel under *Douglas*." *Id.* at 609. Thus, under the Michigan system,

Halbert was entitled to the assistance of counsel in pursing the first discretionary appeal from his conviction.

In the case before us, Martinez asserts a right to counsel in collateral review insofar as that is the first opportunity to obtain review of his ineffective-assistance-of-trial-counsel claim. Under Arizona law, collateral review proceedings are the first point at which an ineffective assistance of counsel claim may be presented for review. *State v. Spreitz*, 202 Ariz. 1, 39 P.3d 525, 527 (Ariz. 2002); *cf. Lambright v. Stewart*, 241 F.3d 1201, 1203-04 (9th Cir. 2001), *cert. denied*, 534 U.S. 1118, 122 S. Ct. 930, 151 L. Ed. 2d 892 (2002). Therefore, Martinez' initial Rule 32 action was the first opportunity for him to obtain review of the effectiveness of his trial counsel. Martinez argues that his claim is thus comparable to that considered in *Halbert* and *Douglas*. He makes three primary arguments: (1) collateral review presented "the first point ('tier') at which state law permitted [him] to raise any ineffective-assistance-of-trial-counsel claim," (2) Arizona courts would review his ineffective-assistance-of-trial-counsel claim asserted in the first post-conviction relief proceeding on the merits, and (3) defendants are "ill equipped to represent themselves in pursuing first-tier review of such claims."

B.

We conclude that there is no federal constitutional right to the assistance of counsel in connection with state collateral relief proceedings, even where those proceedings constitute the first tier of review for an ineffective assistance of counsel claim.

In this case, Martinez seeks to extend his right to counsel to collateral proceedings. But the Court has never recognized a right to counsel in collateral review. Moreover, the Court has never extended the right to counsel beyond a defendant's first appeal. Beginning with *Douglas*, the Court recognized that an indigent criminal defendant has the right to the assistance of appointed counsel only "with the first appeal, granted as a matter of right . . . from a criminal conviction." 372 U.S. at 356. The Court has repeatedly declined to extend the right to counsel beyond a criminal defendant's first appeal of his conviction. In *Ross*, the Court refused to extend a right to counsel to second-tier or certiorari review. 417 U.S. at 615-17. And in *Finley*, the Court declined to recognize a constitutional right to counsel in collateral proceedings, observing that "[o]ur cases establish that the right to appointed counsel extends to the first appeal of right, and no further." 481 U.S. at 555.

A general right to counsel on collateral review cannot be extrapolated from Halbert and *Douglas*. The more difficult question, however, is whether collateral review might constitute the "first tier" of review for a petitioner's ineffective-assistance-of-trial-counsel claim, and thus be sufficient to give rise to a right to counsel. That is, if collateral review entails a determination on the merits of an ineffective assistance of counsel claim, can collateral review represent the first opportunity for a criminal defendant to obtain review of his conviction, such that Martinez is similarly situated to a defendant pursuing his first appeal as of right? We now turn to this important question.

Appendix A

1.

Halbert recognized a right to counsel in certain "discretionary" proceedings. The appellate procedure at issue there was effectively the only means of direct review available to the petitioner. Without the aid of counsel in that discretionary appeal, a plea-convicted defendant would be frustrated in attempting to obtain direct review of his conviction. The appeal procedure at issue in *Halbert* was "discretionary," but was nevertheless equivalent to direct review. *Ross*, although it pertained to "discretionary" appeal procedures, was not analogous.

This case is more like *Ross* than *Halbert*. In *Ross*, the petitioner had already received direct review of his convictions, and had already received the assistance of counsel in connection with that first appeal. Likewise, here, Martinez has already received direct review of his conviction and received the assistance of counsel in connection with that appeal. In *Halbert*, by contrast, the petitioner sought the functional equivalent of direct review, the first appeal of his conviction. Even if collateral review presents the first tier of review for Martinez' ineffective assistance of counsel claim, we conclude that Martinez' action is not analogous to a direct appeal -- or the *first* opportunity for him to obtain review of his conviction -- so as to entitle him to effective counsel. We therefore conclude that Martinez' case is not governed by *Douglas* and *Halbert*.

2.

Martinez asserts that a pro se defendant is "ill equipped" to represent himself in collateral proceedings. But this general assertion does not sway us. Indeed, the assistance of counsel would aid any indigent defendant in pursuing review of his conviction, whether by first-tier or second-tier appeal, or by collateral review. *Ross*, 417 U.S. at 616. Of relevance here, Martinez faces a lesser handicap in pursuing collateral review than a defendant pursuing a first appeal, as in *Douglas* and *Halbert*. Martinez has already received the assistance of appellate counsel in a prior proceeding, like the petitioner in *Ross*.

In *Ross* and *Halbert*, the Court observed that a defendant's handicap on second-tier appeal is far less than the relative handicap borne by the indigent defendant denied counsel in his first appeal as of right. *Ross*, 417 U.S. at 616; *Halbert*, 545 U.S. at 619. A defendant seeking second-tier review will have received the assistance of counsel in connection with direct review, and would have "at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case." *Ross*, 417 U.S. at 615.

Ross's and *Halbert's* analyses of second-tier review applies to the context of collateral review presented in this case. Collateral review is more like a second-tier appeal than a first-tier appeal as of right. Collateral review and direct review are not on equal footing where, as here,

a defendant has already benefitted from the assistance of counsel in a direct appeal. In collateral review proceedings, Martinez does not face the same burden and disadvantages as a defendant pursuing direct review without the assistance of counsel. Even though collateral proceedings might provide the first tier of review for a particular claim, Martinez has already benefitted from the assistance of counsel in his first appeal.

3.

Martinez asserts that collateral review of his ineffective assistance of counsel claim involves a determination on the merits. But this case does not involve a determination on the merits in the same way as *Halbert* and *Douglas*. In *Douglas*, the state intermediate appellate court reviewed the merits of a case in deciding whether to appoint counsel for direct review. The merit of petitioners' cases was reviewed ex parte and without benefit of briefing and argument from counsel. In *Halbert*, the state's intermediate appellate court likewise performed a gatekeeping function by reviewing applications for leave to pursue discretionary appeal independently, looking to the merits of a case as presented in the application. In such situations, without the assistance of counsel, most indigent defendants would be thwarted in their attempts to obtain review of their convictions. In the case before us, however, there is no impediment to the first tier of appeal; that has already been provided to Martinez. The court performs no gatekeeping function that would bar Martinez from presenting his ineffective assistance of counsel claim (for example, an ex parte review of the merits).

Looking to a related point, as set forth above, *Ross* explained that first- and second-tier appeals generally serve different purposes. In a direct criminal appeal, a court sits to correct erroneous adjudication of guilt in an individual case. By contrast, discretionary appeal to a state Supreme Court or to the United States Supreme Court is not intended to correct error in individual cases, but rather to address questions of public importance, critical issues of law, conflicts in the decisions of relevant courts, and so forth. Likewise, collateral review also does not provide a function analogous to direct review. In *Finley*, the Court explained that a defendant could have no right to counsel in a collateral attack upon his conviction, as he had no right to counsel in discretionary second-tier review pursuant to *Ross*. *Finley*, 481 U.S. at 555. The Court reasoned: "[p]ostconviction relief is even further removed from the criminal trial process than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature." *Id.* at 556-57. In collateral review, the courts do not perform an error correction function analogous to an appellate court hearing a criminal defendant's direct appeal as of right from his conviction.

4.

Our conclusion is confirmed by returning to the *Douglas* decision. *Douglas* established the principles on which a right to appellate counsel could be recognized. *Douglas* stated both a due process rationale and an equal protection rationale. Neither supports Martinez' claim.

The due process rationale does not fit here. In *Ross*, the Court explained that the function of trial and appeal are vastly different. As we have already set forth, *Ross* explained that trial serves to convert an accused person to the status of convicted, and may not be eliminated without a defendant's consent. A state, however, has no duty to provide for the appeal of a criminal conviction, and a state similarly has no duty to provide for collateral review. *Finley*, 481 U.S. at 557.

The equal protection rationale is also inapplicable in this case. Equal protection requires that the state appellate system be "free of unreasoned distinctions, . . . and that indigents have an adequate opportunity to present their claims fairly within the adversary system," but the equal protection guarantee does not require the elimination of economic disparities. *Ross*, 417 U.S. at 612. Instead, "[a]bsolute equality is not required; lines can be and are drawn and we often sustain them." *Id.* at 608 (internal quotation marks omitted), *citing Douglas*, 372 U.S. at 356-57; *see also id.* at 612 ("Fourteenth Amendment does not require absolute equality or precise legal advantages" and it does not require the state to "equalize economic conditions") (internal quotation marks and citations omitted). Martinez advances no argument grounded in the rationale of equal protection, and we discern no equal protection concern in this case.

In sum, the Court has repeatedly held that there is no right to counsel in collateral proceedings. The Court has never held that a right to counsel necessarily adheres at every "first tier" of review. Martinez' position rests

on a shaky legal argument that we should recognize an exception to the general rule that there is no right to counsel in collateral review. But this exception would swallow the general rule, *see Bonin v. Calderon*, 77 F.3d at 1160, and we will not adopt it.

C.

We do not review the merits of a habeas petition where the state court decision "rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman*, 501 U.S. at 729. A state procedural rule is not adequate to bar federal review if that "state procedural rule frustrates the exercise of a federal right." *Hoffman*, 236 F.3d at 531. Martinez argues that Arizona Rule of Criminal Procedure 32.2 is not an adequate basis on which to deny federal review, because application of that procedural rule would frustrate the protection of his federal rights. Martinez' argument that Arizona Rule of Criminal Procedure 32.2 is inadequate to bar federal review is dependent upon his position that he has a federal constitutional right to counsel in collateral proceedings.

In this case, Arizona Rule of Criminal Procedure 32.2 is an adequate and independent basis to support the state court judgment. We have held that there is no right to the assistance of counsel in collateral review proceedings, even where those proceedings constitute a first tier of review under the facts of this case. Martinez' contention that Arizona Rule of Criminal Procedure 32.2 is inadequate to bar federal habeas review therefore fails.

Appendix A

Review of Martinez' habeas petition by the federal courts will be procedurally barred unless he can show cause and prejudice to excuse his default. We now turn to that issue.

IV.

Where a habeas petitioner "has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule," the federal courts may not review the petition "unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. Martinez asserts that there may be cause and prejudice to excuse any procedural default "if Petitioner could show that first post-conviction counsel was unconstitutionally ineffective."

We have already concluded that there is no right to the assistance of post-conviction counsel in connection with a state petition for post-conviction relief, such as Martinez asserts in this case. Without a right to the appointment of counsel, there can be no right to the effective assistance of counsel. *Id.* at 752 ("a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings"); *see also Wainwright v. Torna*, 455 U.S. 586, 587-88, 102 S. Ct. 1300, 71 L. Ed. 2d 475 (1982) (per curiam) (where there is no constitutional right to counsel there can be no deprivation of effective assistance). Ineffective assistance of post-conviction counsel cannot provide cause to excuse procedural default. *Manning v. Foster*, 224 F.3d

1129, 1133 (9th Cir. 2000); *Custer v. Hill*, 378 F.3d 968, 974 (9th Cir. 2004) ("Any ineffectiveness of [his] attorney in the post-conviction process is not considered cause for the purposes of excusing the procedural default" (internal quotation marks omitted)). Martinez' claims are procedurally barred.

AFFIRMED.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT (DECEMBER 12, 2008)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

No. CV 08-785-PHX-JAT

Luis Mariano Martinez,

Plaintiff,

vs.

Dora B. Schriro; et al.,

Defendants.

ORDER

Pending before this Court is Petitioner's Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254. On September 17, 2008, the Magistrate Judge to whom this case was assigned issued a Report and Recommendation ("R&R") recommending that the Petition be denied. Doc. # 12. Petitioner filed objections to the R&R, to which Respondents responded and Petitioner replied. Because objections have been filed, the Court will review the Petition de novo. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (*en banc*).

Appendix B

Pages 1 through 9 of the R&R recite the factual and procedural history of this case. R&R at 1-9. Neither party has objected to this account and the Court hereby accepts it. Next, pages 9-16 of the R&R lay out the law governing exhaustion, procedural default (including adequate and independent state grounds), and cause and prejudice. R&R at 9-16. This discussion correctly summarizes the law governing what must occur for a federal court to consider the merits of a habeas claim arising under 28 U.S.C. § 2254 and the Court hereby accepts and adopts this legal framework.

As a preliminary observation, the Court notes that the framework governing when a federal court may consider the merits of a habeas claim arising from a state court conviction is driven by the principles of comity. *See, e.g., Carothers v. Rhay*, 594 F.2d 225, 228 (9th Cir. 1979). Specifically, the federal court should give the state court the first opportunity to consider a claim unless certain very specific exceptions apply. In both his Petition and in his Objections, Petitioner seems to disregard this framework by making arguments without attempting to apply the governing law, or by objecting to the R&R applying the governing law. However, the Court is not free to consider the merits of claims, unless the principles of comity are satisfied.[1] Thus, Petitioner's attempt to make a claim outside of this legal framework must be rejected. Accordingly, this Court, like the R&R, will address Petitioner's arguments within the legal framework governing habeas petitions.

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1. With the exception that the Court may consider a claim on the merits if the Court will deny relief. 28 U.S.C. § 2254(b)(2).

Appendix B

Specifically, as recounted in detail in the R&R, for this Court to consider the merits of a habeas claim, the claim must have been exhausted in state court. Doc. #12 at 9-10. If the claim was exhausted in state court, but denied by the state courts for procedural reasons, this Court cannot reach the merits of the claim (unless cause and prejudice is shown[2]) if the state's procedural ruling, or procedural bar, was based on an adequate and independent state law ground. R&R at 10-14. As indicated in the preceding sentence, the federal court may still reach the merits of a procedurally defaulted state court claim if the petitioner can show cause and prejudice to excuse his default. R&R at 14-16.

As Petitioner notes in his Objections, Petitioner's claim is that his state court trial level counsel was ineffective. Doc. # 13 at 8. Further, Petitioner argues that this Court should reach the merits of that claim because his first post-conviction-relief counsel was ineffective for not raising the ineffective-assistance-of-trial-counsel claim. Doc. # 13 at 8-9. Petitioner bases his ineffective-assistance-of-post-conviction-relief-counsel claim on *Halbert v. Michigan*, 545 U.S. 605, 125 S. Ct. 2582, 162 L. Ed. 2d 552 (2005); Doc. #13 at 4.

However, at no point does Petitioner attempt to make his ineffective-assistance-of-post-conviction-relief-counsel argument within the habeas framework described above. Specifically, in his Petition he states:

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2. There is also an actual innocence exception, but in his Objections Petitioner specifically rejects that he is pursuing this exception. Doc. #13 at 3-4.

Appendix B

> In sum, Petitioner's valid claim of ineffective assistance of first post-conviction relief counsel prohibits procedural default of his valid claims of ineffective assistance of trial counsel.

Doc. #1 at 36.

> In his Objections, Petitioner states:
>
> Petitioner ... argued [in state court]... that his ineffective-assistance-of-trial-counsel claims could not be "precluded" because he was entitled to effective assistance of first post-conviction counsel with respect to the ineffective-assistance-of-trial-counsel claims... .

Doc. #13 at 8.

Petitioner offers no citation within the habeas parlance to support either of these two statements. In fact, it appears that Petitioner is attempting to argue his *Halbert* based (ineffective-assistance-of-post-conviction-relief-counsel) claim completely removes him from the habeas framework. To the extent that is Petitioner's argument, it is rejected. This Court will consider Petitioner's argument within the legal framework governing habeas. Thus, to fit Petitioner's argument into the habeas framework, the Court must interpret the *Halbert* argument in one of two ways: either 1) Petitioner is arguing that the *Halbert* decision causes the state's procedural bar of his ineffective-assistance-of-trial-counsel-claim to not be an adequate state law procedural bar; or 2) Petitioner is

arguing that his *Halbert* based (ineffective-assistance-of-post-conviction-relief-counsel) claim is cause to excuse his procedural default of his ineffective-assistance-of-trial-counsel-claim.

To begin, before this Court will consider the *Halbert* based (ineffective-assistance-of-post-conviction-relief-counsel) claim for either reason listed above, the Court must determine whether Respondent's contention that this claim has not been exhausted in the state courts has merit. Doc. #10 at 10. *Edwards v. Carpenter*, 529 U.S. 446, 452, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000), holds that before ineffective assistance of counsel can form "cause" to excuse procedural default, the ineffective assistance of counsel claim must be exhausted as an independent claim in the state courts. Here, Petitioner never exhausted this claim directly in that he never asked any state court to grant him a new "first-round" of post-conviction-relief based on his claim that his first post-conviction-relief counsel was ineffective. Instead, Respondents assert that Petitioner argued (in state court) that the alleged ineffectiveness of first post-conviction-relief counsel was the reason that, in a second post-conviction-relief petition, the state trial court and appellate court should reach the merits of the ineffectiveness-of-trial-counsel claim. Conversely, Petitioner argues:

> Petitioner's previous filings already have shown that his federal ineffective-assistance-of-first-post-conviction-counsel claim was clearly and unambiguously asserted at every relevant stage of the state court proceedings... and the

> state courts considered the claim (but rejected it on the merits) without suggesting that it was procedurally barred under state law. ... Consequently, there is no legitimate exhaustion issue in this case.

Doc. #15 at 9.

Thus, the issue is whether exhausting the *Halbert* based claim (ineffective-assistance-of-post-conviction-relief-counsel) ***as cause*** for defaulting in state court also exhausts such claim ***as cause*** for defaulting in federal court, when a free-standing ineffective-assistance-of-post-conviction-relief-counsel claim was not raised in state court or in federal court. Based on the facts of this case, the Court finds that Petitioner presented the claim to the state court sufficiently to meet the exhaustion requirement because the state court was put on notice of the ineffective-assistance-of-first-post-conviction-relief counsel claim via the second post-conviction-relief petition.

Having determined that the *Halbert* based (ineffective-assistance-of-post-conviction-relief-counsel) claim was exhausted in state court, the Court must now consider whether alleged ineffective-assistance-of-first-post-conviction-relief counsel is a basis for finding the state's procedural bar is not adequate and independent, as is required to treat the claim as procedurally defaulted in federal court. As the R&R recounts, Arizona's procedural rule precluding post-conviction review of issues that could have been raised earlier but were not has been determined to be adequate and independent by the United States

Supreme Court. R&R at 12-14. Therefore, the issue is whether *Halbert*, which was interpreting Michigan law, effectively overruled the line of cases on adequate and independent cited in the R&R (on the issue of the right to post-conviction-relief counsel).

Halbert involved a defendant in Michigan who pleaded guilty. Under Michigan law, the Supreme Court found that for a pleading defendant, the discretionary appeal to the Michigan Court of Appeals was a "first-tier" of review. *Halbert*, 545 U.S. at 612-14. And, because this review was "first-tier" the defendant was entitled to counsel. *Id.* at 619. Similarly, the Ninth Circuit Court of Appeals has held, albeit on a different issue than the right to counsel, that for a pleading defendant, the first post-conviction-relief petition in Arizona is a "first-tier" of review. *Summers v. Schriro*, 481 F.3d 710, 713 (9th Cir. 2007).

However, Courts have consistently held that there is no right to counsel for post-conviction petitions when such petition is not a "first-tier" of review; i.e. when there was a direct appeal. *See, e.g., Lawrence v. Florida*, 549 U.S. 327, 335 , 127 S. Ct. 1079, 1085, 166 L. Ed. 2d 924 (2007); *Manning v. Foster*, 224 F.3d 1129, 1133 (9th Cir. 2000). In this case, because Petitioner went to trial, he also had a direct appeal to the Arizona Court of Appeals that was a "first-tier" of review. R&R at 3. Therefore, the Court finds *Halbert* inapplicable to this case.[3] Because *Halbert*

3. Similarly, in *Summers*, the Court of Appeals suggested that to the extent *Halbert* has any applicability to Arizona law, such application is for a pleading defendant. *Summers*, 481 F.3d at 713. Specifically, the Court stated, "the Supreme Court held

is inapplicable to Petitioner's situation, the Court further finds that under these facts, *Halbert* does not overrule the line of cases finding Arizona's procedural bar to be adequate and independent. Therefore, this Court finds that Petitioner's ineffective-assistance-of-trial-counsel claim is procedurally defaulted.

As the R&R correctly recounts, and as indicated above, because the ineffective-assistance-of-trial-counsel claim has been procedurally defaulted, this Court cannot consider the merits of the claim unless Petitioner shows cause and prejudice to excuse this procedural default. *See* R&R at 12-16. The R&R concludes, and this Court agrees, that Petitioner's ineffective-assistance-of-post-conviction-relief counsel claim does not show cause to excuse this procedural default. R&R at 21-22. The Court reaches this conclusion because the Court finds, as discussed above, that *Halbert* is inapplicable to this case. Thus, this case is controlled by the cases finding there is no right to post-conviction-relief counsel. Accordingly, even assuming post-conviction-relief counsel was in fact ineffective, such alleged ineffectiveness is insufficient to establish cause to

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in *Halbert*... that a first-tier 'of-right' review procedure available to a plea-convicted Michigan defendant in lieu of a conventional direct appeal is a form of 'direct review' to which a constitutional right to counsel attaches... . The of-right proceeding available to plea-convicted defendants in Michigan is analogous, though not identical, to a Rule 32 of-right proceeding [in Arizona]." *Id.* "To bring an of-right proceeding [in Arizona] under Rule 32, a plea-convicted defendant... ." *Id.* at 715 (emphasis added). And the Arizona courts appear to agree. *See Arizona v. Pruett*, 185 Ariz. 128, 912 P.2d 1357, 1359-60 (Ariz. Ct. App. 1995).

excuse Petitioner's procedural default of his ineffective-assistance-of-trial-counsel claim. Therefore, this Court cannot reach the merits of the ineffective-assistance-of-trial-counsel claim.

Because the Court has reached the conclusion that the ineffective-assistance-of-trial-counsel claim is procedurally defaulted and that Petitioner has not shown cause that would permit this Court to consider the merits of the claim, there are four additional arguments raised by Respondents that this Court need not address. Specifically, first, because Petitioner cannot show cause to excuse his procedural default, this Court need not consider whether he can establish prejudice. Second, because the Court has found *Halbert* inapplicable to this case, the Court need not reach Respondent's argument that under *Teague v. Lane*, 489 U.S. 288, 310, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), *Halbert* is not available to cases on collateral review. Doc. #14 at 8. Third, because this Court has found that Petitioner has not shown cause to excuse his default, this Court need not reach Respondent's argument that under 28 U.S.C. § 2254(i), ineffective assistance of post-conviction counsel cannot form the basis of habeas relief. Doc. #14 at 5-6. Fourth, because the Court has found that even assuming post-conviction-relief counsel was ineffective Petitioner cannot show cause, the Court need not reach the Respondent's argument, as applied in the R&R, that post-conviction-relief counsel was NOT ineffective because trial counsel was NOT ineffective; therefore, post-conviction-relief counsel could not have been ineffective for failing to raise a claim of ineffective assistance of trial counsel because Petitioner cannot

establish prejudice (under either theory) as required by *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). R&R 21-22. Additionally, this Court need not consider the sub-issue to the fourth issue, which is whether this Court would be required to defer to the state court's finding that neither counsel was ineffective (unless such finding was "contrary to, or involved an unreasonable application of, clearly established Federal law," or an unreasonable determination of the facts, *see Lockyer v. Andrade*, 538 U.S. 63, 71, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003)) when the state court made this finding only as an alternative holding, and the state court's decision was actually based on a the procedural bar.

Alternatively, under 28 U.S.C.§ 2254(b)(2), a federal court can reach the merits of a defaulted claim if the court denies relief. Applying this principle, the R&R recommended that relief on the ineffective-assistance-of-trial-counsel claim could be denied on the merits. R&R at 26-28. Petitioner objected to this conclusion. In responding to Petitioner's objection, Respondents noted that they filed a limited answer addressing only procedural default, but agreed that the claim could be denied on the merits. Doc. #14 at 13. Petitioner objects to reaching the merits in this fashion because there has not been full briefing of the issue. Doc. #15 at 10. Petitioner goes on to argue that if this Court intends to consider the merits, it should order supplemental briefing and an evidentiary hearing. *Id.* While the Court does not agree that Petitioner has shown that an evidentiary hearing would be necessary to adjudicate the merits of this claim, the Court will not reach the merits without an opportunity for further briefing by

the parties.[4] Thus, while the Court does not necessarily disagree with the recommendation of the R&R in this regard, because this Court need not alternatively reach the merits, this Court will not adopt the R&R on this point.

Based on the foregoing,

IT IS ORDERED that the R&R (Doc. #12) is accepted to the extent indicated above, the objections (Doc. #13 & 15) are overruled to the extent indicated above, the Petition is denied, with prejudice, and the Clerk of the Court shall enter judgment accordingly.

DATED this 12th day of December, 2008.

/s/
James A. Teilborg
United States District Judge

4. And specifically the Court would want briefing on whether the AEDPA's deferential standard of review would be applicable to an alternative holding of the state court as noted in sub-issue four (not addressed) above.

APPENDIX C — REPORT AND RECOMMENDATION BY UNITED STATES MAGISTRATE JUDGE (SEPTEMBER 17, 2008)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CIV 08-00785 PHX JAT (MEA)

LUIS MARIANO MARTINEZ,

Petitioner,

v.

DORA B. SCHRIRO, et al.,

Respondents.

REPORT AND RECOMMENDATION

TO THE HONORABLE JAMES A. TEILBORG:

Petitioner, who is represented by counsel from the Arizona Justice Project which is affiliated with the Arizona State University School of Law, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on April 24, 2008. *See* Docket No. 1. Respondents filed a Limited Answer to Petition for Writ of Habeas Corpus ("Answer") (Docket No. 10) on July 28, 2008, asserting Petitioner's habeas claims are procedurally barred. Petitioner filed a Reply to the Limited Answer to his habeas petition through counsel on September 2, 2008. *See* Docket No. 11.

Appendix C

I Procedural History

In August of 2001 a jury found Petitioner guilty on two counts of sexual conduct with a minor under the age of 15. *See* Answer, Exh. I. The crimes were alleged to have occurred on a single date in 1999 and involved one victim, a girl eleven years of age on that date. *E.g., id.*, Exh. E at 1-2. The victim was the child of Petitioner's wife, who resided with the couple and her two brothers. *Id.*, Exh. E at 1-2. A video-tape of a forensic interview with the victim by a social worker, during which the victim described the abuse, was shown to the jury over the objection of defense counsel. *See id.*, Exh. E at 5.

After Petitioner's arrest and before his trial, the victim recanted her statements to various individuals, including her grandmother. *Id.*, Exh. E at 8. The victim's grandmother and the other individuals to whom the victim recanted her statements testified at Petitioner's trial. *Id.*, Exh. E at 8. Additionally, a second forensic interview with the social worker, during which interview the victim recanted her allegations, was shown to the jury. *Id.*, Exh. E at 6.

Petitioner was represented by an appointed public defender at his trial. *See id.*, Exh. B. At Petitioner's trial, in response to questions from the prosecution, the victim repeatedly answered "I don't know" or "I don't remember." *Id.*, Exh. N at 3. At Petitioner's trial the victim denied Petitioner had sexually abused her. *Id.*, Exh. I at 3.

The victim's mother, Petitioner's wife, testified for the defense.[1] *Id.*, Exh. E at 10. Petitioner's wife testified that she did not believe her daughter had told the truth about the alleged incident. *Id.*, Exh. E at 12. Petitioner's wife also testified that her daughter had told her the daughter had lied about the alleged abuse both to the police and in the initial forensic examination. *Id.*, Exh. E at 12-14.

On February 19, 2002, pursuant to the jury finding him guilty, Petitioner was sentenced to consecutive terms of life imprisonment with no possibility of parole for 35 years pursuant to each conviction for sexual conduct with a minor. *Id.*, Exh. 1.

Petitioner took a direct appeal of his convictions and sentences. *Id.*, Exh. I. Petitioner was represented by retained counsel, Ms. Levitt, in his direct appeal. *Id.*, Exh. B. In his direct appeal Petitioner asserted that the verdicts were against the weight of the evidence and that

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1. Prior to the trial the Superior Court appointed counsel to represent Petitioner's wife because the state informed the court it believed Petitioner's wife committed a criminal act by providing the media with a copy of the grand jury transcript. Outside the presence of the jury, before she testified at Petitioner's trial, the state indicated that they were considering charging Petitioner's wife with a crime, i.e., disclosure of the transcript. The state also asserted that any discrepancies in Petitioner's wife's testimony and her earlier statements might result in charges of perjury. In response, defense counsel moved for a mistrial based on prosecutorial misconduct for threatening a defense witness, informing the court that Petitioner's wife was shaken and afraid to testify on Petitioner's behalf, affecting her credibility before the jury. Answer, Exh. E at 11.

the trial court erred by denying his motion for a mistrial based on prosecutorial misconduct. *Id.*, Exh. J (petition for review to the Arizona Supreme Court). Petitioner also asserted the trial court erred by denying his motion for a new trial based on newly discovered evidence, i. e., exculpatory statements in the victim's diary which were produced by the victim's mother after the trial. *Id.*, Exh. J.

Petitioner's direct appeal was stayed on May 13, 2002, to allow Petitioner's then-pending first action for post- conviction relief to be decided by the trial court. *See id.*, Exh. A. The same retained counsel represented Petitioner in his direct appeal and his first state action for post-conviction relief. *Id.*, Exh. B & Exh. D. After the conclusion of Petitioner's first action for post-conviction relief, on March 22, 2004, the Arizona Court of Appeals affirmed Petitioner's convictions and sentences in his direct appeal. *Id.*, Exh. I. Petitioner sought review of this decision by the Arizona Supreme Court, which declined review on September 21, 2004. *Id.*, Exh. K.

Petitioner had initiated a first state action for post-conviction relief pursuant to Rule 32, Arizona Rules of Criminal Procedure, on May 28, 2002, prior to the time his direct appeal was decided. *Id.*, Exh. B. Petitioner was represented by retained counsel, Ms. Levitt, in his first post-conviction action. *Id.*, Exh. B & Exh. F. After asking for several extensions of time to review the record, Petitioner's counsel informed the state court she could find no meritorious argument to raise on Petitioner's behalf. *Id.*, Exh. F. Petitioner did not file a *pro se* pleading in his Rule 32 action and, when the time for doing so expired

on April 28, 2003, the state court dismissed the Rule 32 action. *Id.*, Exh. G. As stated supra, upon this dismissal Petitioner's ultimately unsuccessful direct appeal resumed and concluded in September of 2004.

Petitioner initiated a second state Rule 32 action on October 18, 2004. *Id.*, Exh. L. In his memorandum of law filed in that action on February 2, 2005, through his current counsel, Petitioner argued to the state court that his trial counsel was unconstitutionally ineffective. *Id.*, Exh. M. Petitioner alleged counsel should have introduced counsel's pretrial interview with the victim as evidence at Petitioner's trial. Petitioner asserts this potential evidence was exculpatory and that counsel also failed to put before the jury other exculpatory pretrial statements made by the victim. Petitioner asserted his trial counsel failed to properly impeach the victim's credibility.

Petitioner also alleged his trial counsel erred by not properly impeaching an investigating police officer's testimony. *Id.*, Exh. M. Petitioner further asserted that his trial counsel erred by not fully investigating "Child Sexual Abuse Accommodation Syndrome" ("CSAAS"). Petitioner alleges he was prejudiced by this error when his trial counsel failed to properly cross-examine the state's witness on this subject. Petitioner also argued his trial counsel erred by failing to present character witnesses on Petitioner's behalf. *Id.*, Exh. M. Lastly, in this second Rule 32 action Petitioner alleged Ms. Levitt, who was both his appellate counsel and first post-conviction action counsel, was prejudicially incompetent for failing to raise the issue of his trial counsel's performance. *Id.*, Exh. M.

Appendix C

The state court dismissed Petitioner's second Rule 32 action on November 4, 2005, finding the petition was not timely and that Petitioner had not met an exception to the timeliness rule. The state court also concluded that the claims were procedurally barred, and that the claims were without merit. *Id.*, Exh. N. With regard to the merits of Petitioner's claims, the state court concluded Petitioner's trial counsel's performance was not deficient and that Petitioner was not prejudiced by any of the alleged deficiencies. The state court determined any further impeachment of the victim by her inconsistent pretrial statements would have been cumulative. The state court also decided Petitioner's counsel's strategy to not engage in a battle of experts with regard to CSAAS was not deficient performance nor prejudicial to Petitioner. The state court concluded any such error was not prejudicial, *inter alia* because counsel effectively cross-examined the state's witness on this point. *Id.*, Exh. N.

Petitioner sought a rehearing regarding this decision, which motion was denied on December 1, 2005. *Id.*, Exh. O & Exh. P. Although the trial court concluded it had erred by finding the claims stated in the second Rule 32 action time-barred, it again found the claims were procedurally barred and without merit. *Id.*, Exh. P. The Arizona Court of Appeals denied review of this decision on August 31, 2006. *Id.*, Exh. R. The Arizona Supreme Court also denied review on May 22, 2007. *Id.*, Exh. S.

Petitioner filed his federal habeas petition on April 24, 2008. Petitioner argues he is entitled to federal habeas relief because he was denied his right to the effective assistance of trial and appellate counsel.

Appendix C

Respondents contend relief on Petitioner's federal habeas claims is procedurally barred because the claims were not properly exhausted in the state courts and Petitioner has not shown cause for, nor prejudice arising from, his procedural default of the claims. Respondents argue the state court's decision finding consideration of the merits of the claims procedurally precluded was an adequate and independent basis for barring federal habeas relief on the merits of the claims.

Replying to the assertion that his claims are procedurally defaulted, Petitioner contends his claims "are not procedurally defaulted because he did not receive the effective assistance of **first post-conviction** counsel—specifically with respect to ineffective assistance of **trial** counsel—to which he was entitled under *Halbert v. Michigan*, 545 U.S. 605 (2005)."[2] Docket No. 11 at 2

2. In *Halbert* the United States Supreme Court concluded that the federal constitutional guarantees of due process and equal protection required the appointment of counsel for indigent defendants, convicted pursuant to guilty pleas, for purposes of their "first-tier" review in the Michigan Court of Appeals. The Supreme Court determined that the defendant could not have waived his due process and equal protection rights to appointed counsel by means of his guilty plea. *See* 545 U.S. 605, 125 S. Ct. 2582 (2005). The Sixth Circuit Court of Appeals has concluded that *Halbert* is not applicable to cases on collateral review at the time it was decided. *See Simmons v. Kapture*, 516 F.3d 450, 451 (2008). Nonetheless, the issue in *Halbert* was the defendant's entitlement to appointed counsel during his first appeal as of right after pleading guilty. Petitioner argues *Halbert* provides that a *non*-pleading Arizona defendant, for whom a first Rule 32 action is not their first appeal as of right, is constitutionally entitled to

(emphasis in original) . Petitioner asserts "Respondents' procedural-default defense is without merit." *Id.* Petitioner notes that his second state action for post-conviction relief "argued that his ineffective-assistance-of-trial-counsel claims could not be 'precluded' because (1) he was entitled to effective assistance of first post-conviction counsel with respect to the ineffective-assistance-of-counsel claims, and (2) first post-conviction counsel ( ) was ineffective." *Id.*[3]

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the effective assistance of Rule 32 counsel because this is the first instance at which an Arizona defendant may properly raise a claim that he was deprived of his Sixth Amendment right to the effective assistance of trial counsel.

3. In Arizona both pleading and non-pleading indigent defendants are appointed counsel for their first Rule 32 proceedings. However, this "right" has been held to be a matter of state law, not a federal constitutional right. In *Cook v. Schriro* the Ninth Circuit recently stated: "There is no constitutional right to counsel, however, in state collateral proceedings after exhaustion of direct review." 538 F.3d 1000, 2008 WL 3484870, at * 18, *citing Pennsylvania v. Finley*, 481 U.S. 551, 556, 107 S. Ct. 1990, 1994 (1987) ("[I]t is the source of that right to a lawyer's assistance, combined with the nature of the proceedings, that controls the constitutional question. In this case, respondent's access to a lawyer is the result of the State's decision, not the command of the United States Constitution."). The *Cook* decision continues: "Under Arizona law, a defendant is only entitled to counsel through the disposition of his or her first post-conviction petition. . . . Because Cook had no constitutional right to counsel at the motion for rehearing [of his first post-conviction action] stage, any errors by his counsel could not constitute cause to excuse the default . . ."

Appendix C

Petitioner contends his case is controlled by *Halbert*, which was issued during the pendency of Petitioner's second action for state post-conviction relief. Petitioner contends he has federal constitutional right to the effective assistance of counsel not only for purposes of his direct appeal but also in his first state action for post-conviction relief. Petitioner argues Halbert established this right because, in Arizona, a defendant's first Rule 32 action is their "first-tier review" of claims of ineffective assistance of trial counsel. Accordingly, Petitioner asserts, an ineffective assistance of trial counsel claim can only properly be raised in a first Rule 32 action and post-conviction counsel who fails to raise such a claim is unconstitutionally ineffective. *Id.* at 6-7 & 10.[4] Petitioner further contends that the Arizona courts' procedural rule, precluding claims of ineffective assistance of post-conviction counsel in a subsequent Rule 32 action, is not an "adequate" state rule which would provide an independent basis for barring consideration of the merits of Petitioner's habeas claims. *Id.* at 10. Petitioner also asserts that, if he has procedurally defaulted his habeas claims, he has established cause to overcome the default

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4. Adopting this argument would mean that every Arizona defendant could, as a matter of right which they do not now possess, bring a second Rule 32 action asserting their post-conviction counsel was constitutionally ineffective. By this means every defendant could raise the issue of the effectiveness of their trial counsel for the first time in a second Rule 32 action, the non-pleading defendant's third avenue of review, because it would be necessary to undertake an analysis of the validity of the ineffective assistance of trial counsel claim to determine if post-conviction counsel's performance was deficient for failing to raise the claim.

by demonstrating ineffective assistance of post-conviction counsel, an independent constitutional violation.

II Analysis

A. Exhaustion

Section 2254 prevents the District Court from granting federal habeas relief based on a claim that the petitioner's federal constitutional rights were violated if the claim was not "exhausted" in the state courts. *See* 28 U.S.C. § 2254(b) (1) (A) (2003 & Supp. 2008); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842, 119 S. Ct. 1728, 1731 (1999); *Rose v. Palmateer*, 395 F.3d 1108, 1110 (9th Cir. 2005). "We may not consider any federal-law challenge to a state-court decision unless the federal claim was either addressed by or properly presented to the state court that rendered the decision we have been asked to review." *Cook v. Schriro*, 538 F.3d 1000, 2008 WL 3484870, at *16 (9th Cir.), *quoting Howell v. Mississippi*, 543 U.S. 440, 443, 125 S. Ct. 856, 858 (2005). To properly exhaust a federal habeas claim the petitioner must afford the state the opportunity to rule upon the merits of the claim by "fairly presenting" the claim to the state's "highest" court in a procedurally correct manner. *See, e.g.*, *Duncan v. Henry*, 513 U.S. 364, 365, 115 S. Ct. 887, 887-88 (1995); *Rose*, 395 F.3d at 1110.

B. Procedural default

A federal habeas petitioner has not exhausted a federal habeas claim if he still has the right to raise the claim "by any available procedure" in the state courts.

28 U. S. C. § 2254 (c) (2003 & Supp. 2008). Because the exhaustion requirement refers only to remedies still available to the petitioner at the time they file their action for federal habeas relief, it is satisfied if the petitioner is procedurally barred from pursuing their claim in the state courts. *See Woodford v. Ngo*, 541 U.S. 81, 126 S. Ct. 2378, 2387 (2006); *Castille v. Peoples*, 489 U.S. 346, 351, 109 S. Ct. 1056, 1060 (1989).

Accordingly, if it is clear the habeas petitioner's claim is procedurally barred pursuant to state law, the claim is exhausted by virtue of the petitioner's "procedural default" of the claim. *See*, e.g., *Woodford*, 541 U.S. at 92-93, 126 S. Ct. at 2387. Procedural default occurs when a petitioner has never presented a federal habeas claim in state court and is now barred from doing so by the state's procedural rules, including rules regarding waiver and the preclusion of claims. *See Castille*, 489 U.S. at 351-52, 109 S. Ct. at 1060; *Johnson v. Lewis*, 929 F.2d 460, 462 (9th Cir. 1991). Procedural default also occurs when a petitioner did present a claim to the state courts, but the state courts did not address the merits of the claim because the petitioner failed to follow a state procedural rule, including rules regarding waiver and the preclusion of claims. *See, e.g., Ylst v. Nunnemaker*, 501 U.S. 797, 802, 111 S. Ct. 2590, 2594-95 (1991); *Coleman v. Thompson*, 501 U.S. 722, 727-28, 111 S. Ct. 2546, 2553-57 (1991); *Ellis v. Armenakis*, 222 F.3d 627, 632 (9th Cir. 2000); *Szabo v. Walls*, 313 F.3d 392, 395 (7th Cir. 2002).

However, the state procedural bar providing for the exhaustion of a habeas claim is also an adequate

and independent state law basis for a federal court to deny review of the merits of a petitioner's claims for federal habeas relief. "A federal court is precluded from reviewing the merits of a claim when the state court has denied relief on the basis of an independent and adequate state procedural default." *Cooper v. Brown*, 510 F.3d 870, 924 (9th Cir. 2007). If the District Court finds there is an independent and adequate state procedural ground barring a state court from hearing the merits of a petitioner's claims, "federal habeas review [on those claims] is barred unless the [petitioner] can demonstrate cause for the procedural default and actual prejudice, or demonstrate that the failure to consider the claims will result in a fundamental miscarriage of justice." *Noltie v. Peterson*, 9 F.3d 802, 804-05 (9th Cir. 1993). *See also Park v. California*, 202 F.3d 1146, 1150 (9th Cir. 2000). "If a prisoner has defaulted a state claim by 'violating a state procedural rule which would constitute adequate and independent grounds to bar direct review ... he may not raise the claim in federal habeas, absent a showing of cause and prejudice or actual innocence.' *Ellis*, 222 F. 3d at 632, *quoting Wells v. Maass*, 28 F.3d 1005, 1008 (9th Cir. 1994).

> Federal courts hearing habeas petitions may not review state convictions, even for federal constitutional claims, if the state court judgment procedurally barring the petitioner's claims rests on an independent and adequate state law ground. []. Procedural default, a particular type of adequate and independent state ground, applies to bar federal habeas review when the state court has declined to

> address the petitioner's federal claims because he failed to meet state procedural requirements ...

Insyxiengmay v. Morgan, 403 F. 3d 657, 665 (9th Cir. 2005) (internal citations and quotations omitted).

"For the procedural default rule to apply, however, the application of the state procedural rule must provide 'an adequate and independent state law basis' on which the state court can deny relief." *Park*, 202 F.3d at 1151, *quoting Coleman*, 501 U.S. at 729-30, 111 S. Ct. at 2553-54. Accordingly, only a "firmly established and regularly followed state practice" may be interposed by a state to prevent habeas review of the merits of a federal constitutional claim. *Ford v. Georgia*, 498 U.S. 411, 423-24, 111 S. Ct. 850, 857 (1991); *James v. Kentucky*, 466 U.S. 341, 48-51, 104 S. Ct. 1830, 1835-37 (1984); *Collier v. Bayer*, 408 F.3d 1279, 1283-84 (9th Cir. 2005). The United States Supreme Court has affirmed that the Arizona state courts' application of Rule 32.2, Arizona Rules of Criminal Procedure, precluding the post-conviction review of issues if the defendant could have but failed to present them at an earlier proceeding, is a firmly established and regularly followed state practice. *See Stewart v. Smith*, 536 U.S. 856, 860, 122 S. Ct. 2578, 2581 (2002). *See also Cook*, 2008 WL 3484870, at *17; *Ortiz v. Stewart*, 149 F.3d 923, 931-32 (9th Cir. 1998); *Carriger v. Lewis*, 971 F.2d 329, 333 (9th Cir. 1992).[5]

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5. In a decision published only in the Federal Appendix, the Ninth Circuit stated:

> We have previously held that "Arizona's procedural rules are consistently and regularly followed and are

Appendix C

If the state raises the existence of an independent and adequate state procedural ground as a defense to relief on the merits of a habeas petitioner's claims, the petitioner must raise "specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent application of the rule," to avoid a finding that the rule is an adequate and independent bar to habeas relief. *Bennett v. Mueller*, 322 F.3d 573, 584 & 586 (9th cir. 2003), *quoting Hooks v. Ward*, 184 F.3d 1206, 1217 (l0th Cir. 1999). Otherwise, the petitioner must establish cause and actual prejudice to avoid imposition of the procedural bar to relief on the merits of his claims. *See Rich v. Calderon*, 187 F.3d 1064, 1066 (9th Cir. 1999).

C. Cause and prejudice

Federal habeas relief based on a procedurally defaulted claim is barred unless the petitioner can

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adequate to bar federal review." *Poland*, 169 F.3d at 585. Generally, State rules are deemed inadequate if they are either "selectively applied to bar the claims of certain litigants" or "unsettled due to ambiguous or changing state authority." *Wood v. Hall*, 130 F.3d 373, 377 (9th Cir. 1997) ... Arizona has not made application of this procedural bar dependent on an antecedent federal ruling, such as the determination of constitutional error. *See Carter v. Giurbino*, 385 F.3d 1194, 1197-98 (9th Cir. 2004) (finding independence of procedural default because state courts "reject sufficiency of the evidence claims as non-cognizable habeas claims ... solely as a matter of state law") ....

Quintero v. Stewart, 121 Fed. App. 203, 206 (2005).

demonstrate a fundamental miscarriage of justice will occur if the Court does not consider the merits of the claim, or cause and actual prejudice to excuse their default of the claim. *See House v. Bell*, 547 U.S. 518, 126 S. Ct. 2064, 2076 (2006); *Dretke v. Haley*, 541 U.S. 386, 392-93, 124 S. Ct. 1827, 1852 (2004).

"Cause" is a legitimate excuse for the petitioner's procedural default of the claim and "prejudice" is actual harm resulting from the alleged constitutional violation. *See Thomas v. Lewis*, 945 F.2d 1119, 1123 (9th Cir. 1991) To demonstrate cause, a petitioner must show the existence of some external factor which impeded his efforts to comply with the state's procedural rules. *See Vickers v. Stewart*, 144 F. 3d 613, 617 (9th Cir. 1998); *Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1305 (9th Cir. 1996). To establish prejudice, the petitioner must show that the underlying alleged constitutional error worked to his actual and substantial disadvantage, infecting his entire trial with constitutional violations. *See Vickers*, 144 F.3d at 617; *Correll v. Stewart*, 137 F.3d 1404, 1415-16 (9th Cir. 1998). Establishing prejudice requires a petitioner to prove that, "but for" the alleged constitutional violations, there is a reasonable probability he would not have been convicted of the same crimes. *See Manning v. Foster*, 224 F.3d 1129, 1135-36 (9th Cir. 2000); *Ivy v. Caspari*, 173 F.3d 1136, 1141 (8th Cir. 1999). Although both cause and prejudice must be shown to excuse a procedural default, the Court need not examine the existence of prejudice if the petitioner fails to establish cause. *See Engle v. Isaac*, 456 U.S. 107, 134 n.43, 102 S. Ct. 1558, 1575 n.43 (1982); *Thomas*, 945 F.2d at 1123 n.10.

Appendix C

Allegedly ineffective assistance of counsel does not establish cause for the failure to properly exhaust a habeas claim in the state court unless the specific Sixth Amendment claim providing the basis for cause was itself properly exhausted in the state courts. *See Edwards v. Carpenter*, 529 U.S. 446, 451, 120 S. Ct. 1587, 1591 (2000). Additionally, "[a]ttorney error does not constitute cause to excuse a procedural default unless counsel's performance was constitutionally deficient." *Deitz v. Money*, 391 F.3d 804, 809 (6th Cir. 2004). *See also Coleman*, 501 U.S. at 755, 111 S. Ct. at 2567 ("We reiterate that counsel's ineffectiveness will constitute cause only if it is an independent constitutional violation").

III Analysis of Respondents' allegation that Petitioner's claims are procedurally barred

In denying Petitioner's second action for state post-conviction relief,[6] after "having considered the arguments of counsel," the state Superior Court concluded "that all issues identified by counsel could have been raised in the original PCR and [] are therefore precluded ..." Answer, Exh. N at 4. The Superior Court also addressed the merits of Petitioner's ineffective assistance of counsel claims. The state Superior Court summarized Petitioner's ineffective assistance of trial counsel claims as arguing counsel "was incompetent because he did not properly prepare for and did not present certain evidence at trial; and he did not

6. As noted *supra*, Petitioner's first state action for post-conviction relief was dismissed after his counsel stated she could find no meritorious claims to raise on his behalf and Petitioner did not file a pro se brief asserting any claims.

prevent certain evidence from being admitted during the trial; and Appellate/Post Conviction Relief counsel was incompetent because she failed to raise the issues noted above." *Id.*, Exh. N at 2.

The Superior Court noted its review of the record and the fact that it presided over the trial and concluded:

> [Petitioner's] counsel's arguments do not raise a colorable claim of ineffective assistance of trial counsel, and, in any event, that claim is precluded; Counsel's arguments do not raise a colorable claim of ineffective assistance of appellate/Post Conviction Relief [counsel] and, in any event, the claim lacks any merit; Counsel failed to raise the one issue that *might* have a chance of resulting in review, (ie., the 8th amendment issue re: the length of the mandatory sentence imposed) even though trial counsel raised the issue at sentencing.

Id., Exh. N at 2.

The state court also noted the victim's inconsistent statements in court and the evidence regarding her recantations and "her 'impeachment' by her prior statements." *Id.*, Exh. N at 2. The state court continued that any additional

> [c]alling of witnesses to testify about [the victim's] recantation or playing a videotape of her defense interview would have been

> largely cumulative and was not likely to have changed the result. [] The jury was free to and did believe the victim's original reports. This Court presumes, as it must, that trial counsel exercised his trial strategy and discretion appropriately.

Id., Exh. N at 3.

The state court also found that it could not find fault with counsel's decision to forego a 'battle of the experts'" regarding CSAAS, noting that counsel

> effectively cross-examined [the state's expert] with respect to what motives a child might have to accuse someone of sexual misconduct. This Court cannot find merit in counsel's extended arguments that an opposing expert could have made a difference. The real issue is whether [the expert] vouched for the victim's credibility... Under the circumstances, this Court is comfortable with the fact that the jury had the opportunity to and did weight the conflicts in the testimony and after approximately eight (8) hours of deliberation, resolved the conflicts in favor of the State ...

Id., Exh. N at 3. The state court noted that

> trial counsel had very limited options available to him to deal with the issue of semen on the victim's nightgown. He did a credible

> job suggesting the victim's mother wore the nightgown or that the semen got on the nightgown when the victim climbed into her mom's bed or when she changed clothes in the bathroom.

Id., Exh. N at 3.

The Superior Court decided that, "[e]ven were this Court inclined to do so, this Court cannot find that if trial counsel had done everything suggested by counsel in this Post Conviction Relief, the result would have changed." *Id.*, Exh. N at 3. Citing *Strickland v. Washington*, the Superior Court determined that, because trial counsel's performance was not deficient nor prejudicial, appellate and post-conviction relief counsel's failure to raise the issue was not deficient performance nor prejudicial. *Id.*, Exh. N at 4. Accordingly, the state court concluded Petitioner had not raised a colorable claim of ineffective assistance of trial or appellate or post-conviction counsel.

The Arizona Court of Appeals granted review of this decision and denied relief without discussing the merits of Petitioner's ineffective assistance of trial counsel claims. The Arizona Court of Appeals concluded the Superior Court did not abuse its discretion by ruling Petitioner's ineffective assistance of trial counsel claims were precluded by his failure to raise them in his first Rule 32 action. *Id.*, Exh. R at 2. Distinguishing *Halbert*, the appellate court disagreed with Petitioner's assertion that his ineffective assistance of trial counsel claims were not precluded because his first post-conviction counsel's

performance was allegedly defective for failing to raise them in that action. *Id.*, Exh. R at 2. The appellate court stated that Petitioner did not have a constitutional right to the effective assistance of post-conviction counsel. *Id.*, Exh. R at 2.

A state court's application of a procedural rule, i.e., the Arizona courts' application of Rule 32.2, Arizona Rule of Criminal Procedure governing the waiver and preclusion of claims,[7] is not undermined if the state court simultaneously rejects the merits of the defendant's constitutional claim. *See Harris v. Reed*, 489 U.S. 255, 264 n.10, 109 S. Ct. 1038, 1044 n.10. (1989); *Bennett*, 322

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7. An Arizona state prisoner may obtain collateral review of any federal constitutional claim in the Arizona state courts pursuant to Rule 32.1 of the Arizona Rules of Criminal Procedure. Under Rule 32.2(a) such review is barred, however, if (1) the issues are still raisable on direct appeal or on a post-trial motion, (2) they have been finally adjudicated on the merits on appeal or in a previous collateral proceeding, or (3) they were "knowingly, voluntarily and intelligently not raised at trial, on appeal, or in any previous collateral proceeding." Subsection (c) of Rule 32.2 provides that

> [t]he court may infer from the petitioner's failure to raise an issue on appeal after being advised by the sentencing judge of the necessity that he do so, or his failure to raise any ground then available to him in a previous Rule 32 proceeding in which he was represented by counsel, that he knowingly, voluntarily and intentionally relinquished the right to do so.

Johnson v. Lewis, 929 F.2d 460, 463 (9th Cir. 1991).

F.3d at 580; *Carriger*, 971 F.2d at 333. Unless a state court's decision finding a claim procedurally barred "fairly appears" to rest primarily upon federal law, the District Court should not assume that the state judgment failed to rely exclusively on its own sovereign principles. *See Coleman*, 501 U.S. at 737, 111 S. Ct. at 2558; *Bennett*, 322 F.3d at 580. A state decision adequately rests on a state-law basis when the state court "explicitly" invokes a state procedural rule as a separate basis for its decision denying relief and the state court did not make application of the procedural bar depend on an antecedent ruling on federal law. *See Vang v. Nevada*, 329 F.3d 1069, 1074 (9th Cir. 2003). *See also Cooper*, 510 F.3d at 924; *Bennett*, 322 F.3d at 580; *Park*, 202 F.3d at 1152.[8]

8.

> [The] AEDPA, [] precludes us from granting a state habeas petition "with respect to any claim that was adjudicated on the merits in State court proceedings" unless the state's adjudication of the claim meets certain criteria. [] We have held that "a state has 'adjudicated' a petitioner's constitutional claim 'on the merits' for purposes of § 2254(d) when it has decided the petitioner's right to post conviction relief on the basis of the substance of the constitutional claim advanced, rather than denying the claim on the basis of a procedural or other rule precluding state court review of the merits." [] Where, as here, no state court considered [the petitioner's] claim on the merits, § 2254(d) is simply inapplicable.
>
> ... Because the state courts never adjudicated [the petitioner's] constitutional claim on the merits, but rejected it on procedural grounds, the better course is to decline to address [the] procedurally-barred claim. *See Windham v. Merkle*, 163 F.3d 1092, 1101 (9th Cir. 1998). However, if the majority

Appendix C

In this matter the Arizona Court of Appeals, the highest state court to consider the issue, relied on the Rule 32.2 procedural bar as an independent basis for denying review of the merits of Petitioner's ineffective assistance of trial counsel claims. The state appellate court clearly and expressly held that the issue was waived pursuant to the state's procedural rules and the state court did not overlook this waiver. The Superior Court's decision to alternatively or simultaneously reject the merits of the claim does not undermine the Court of Appeals' application of the state procedural bar to Petitioner's proper exhaustion of his constitutional claim. *See Harris*, 489 U.S. at 264 n.10, 109 S. Ct. at 1044 n.10. *Compare Belmontes v. Ayers*, 529 F.3d 834, 855 (9th Cir. 2008) ("where, as here, the state court did not 'clearly and expressly' rely solely upon procedural default in rejecting a petitioner's claim, this court may address the merits of that claim."); *Lambright v. Stewart*, 241 F.3d 1201, 1205 (9th Cir. 2001).

Petitioner has not shown cause for, nor prejudice arising from, his procedural default of his ineffective assistance of trial counsel claim. Because Petitioner had post-conviction counsel, who decided not to raise an ineffective assistance of trial counsel claim, he was not deprived of any right established by *Halbert*, i.e., a due process right to appointed counsel. After counsel filed a brief stating she could find no meritorious issues to raise

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insists on reaching the issue, AEDPA is inapplicable, and our precedent requires de novo review.

Medley v. Runnels, 506 F.3d 857, 870 (9th Cir. 2007) (Ikuta, J. dissenting) (some internal citations omitted).

on Petitioner's behalf, Petitioner himself could have filed a pro per petition asserting he was denied the effective assistance of trial counsel. At that time, Petitioner's direct appeal had been stayed and his appointed counsel could have raised any issue regarding insufficient evidence or the improper admission of evidence. Even if properly exhausted as a separate claim in the state courts, which is arguable, Petitioner's post-conviction counsel's performance was not unconstitutionally deficient nor prejudicial; the state court concluded the ineffective assistance of trial counsel claim raised by Petitioner would have failed on the merits. Because Petitioner was not deprived of any right to post-conviction counsel or an arguable right to the effective assistance of post-conviction counsel,[9] his allegation of ineffective assistance of post-conviction counsel does not constitute cause for Petitioner's procedural default of his ineffective assistance of trial counsel claim.

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9. Petitioner's post-conviction counsel's performance could arguably constitute cause for his procedural default of his claim that his trial counsel was ineffective if post-conviction counsel's performance was defective and Petitioner was prejudiced by the deficiency. *See Cook*, 2008 WL 3484870, at *18. However, to succeed on an assertion his post-conviction counsel's performance was deficient because counsel failed to raise a particular argument, the petitioner must establish the argument was likely to be successful, thereby establishing that he was prejudiced by his counsel's omission. *See Tanner v. McDaniel*, 493 F.3d 1135, 1144 (9th Cir.), *cert. denied*, 128 S. Ct. 722 (2007); *Weaver v. Palmateer*, 455 F.3d 958, 970 (9th Cir. 2006), *cert. denied*, 128 S. Ct. 177 (2007).

Appendix C

IV Fundamental miscarriage of justice

Absent a showing of cause and prejudice, review of the merits of procedurally defaulted habeas claims is appropriate if the petitioner demonstrates review of the merits of his claims is necessary to prevent a fundamental miscarriage of justice. *See Schlup v. Delo*, 513 U.S. 298, 327, 115 S. Ct. 851, 867 (1995); *Murray v. Carrier*, 477 U.S. 478, 485-86, 106 S. Ct. 2639, 2649 (1986). A fundamental miscarriage of justice occurs when a constitutional violation has probably resulted in the conviction of one who is actually innocent. *See Schlup*, 513 U.S. at 326-27,115 S. Ct. at 867 (concluding the "probably resulted" standard rather than the more stringent "clear and convincing" standard must be applied); *Murray*, 477 U.S. at 485-86, 106 S. Ct. at 2649; *Thomas v. Goldsmith*, 979 F.2d 746, 749 (9th Cir. 1992) (showing of factual innocence is necessary to trigger manifest injustice relief).

To satisfy the "fundamental miscarriage of justice" standard, Petitioner must establish it is more likely than not that no reasonable juror could have found him guilty of the offenses. *Schlup*, 513 U.S. at 327, 115 S. Ct. at 867;[10]

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10. The Supreme Court stated in *Schlup*:

> [I]f a petitioner [] presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims.

513 U.S. at 316, 115 S. Ct at 861.

Wildman v. Johnson, 261 F.3d 832, 842-43 (9th Cir. 2001). To be entitled to consideration of his defaulted habeas claims of constitutional error Petitioner must present a colorable showing of factual innocence. *See Herrera v. Collins*, 506 U.S. 390, 404, 113 S. Ct. 853, 862 (1993) (applying a very high standard of review to a claim of actual innocence on habeas review because the reviewing court assumed the trial was free of constitutional error). If Petitioner does not present supplementary post-trial evidence establishing he is factually innocent, he may not avoid the procedural bar to consideration of the merits of his habeas claims; a claim of factual innocence is not a claim of constitutional error. *See Schlup*, 513 U.S. at 315, 115 S. Ct. at 861; *Coley v. Gonzales*, 55 F.3d 1385, 1387 (9th Cir. 1995).[11]

The Supreme Court has recognized that any "actual innocence" exception to a procedural bar to consideration

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11. Even if Petitioner can establish his trial included a constitutional violation, i.e., ineffective assistance of counsel, without "new" evidence of his actual innocence, the violation is not a "miscarriage of justice" because the violation did not result in the conviction of one who is "actually innocent." Conversely, before the Court may excuse Petitioner's procedural error based on the conclusion Petitioner was subjected to a "miscarriage of justice," Petitioner must make a showing that, not only is he factually innocent, but that his trial included constitutional error, i.e., ineffective assistance of counsel. *See Schlup v. Delo*, 513 U.S. 298, 115 S. Ct. 851 (1995). In *Schlup*, the Supreme Court did not reach the merits of the petitioner's constitutional claims because it concluded the lower court erred by not applying the standard stated in *Murray v. Carrier* to the petitioner's claim that his actual innocence overcame his procedural default of his habeas claims.

of federal habeas claims is concerned with actual, as opposed to legal, innocence. *See Bousley v. United States*, 523 U.S. 614, 623, 118 S. Ct. 1604, 1611 (1998); *Schlup*, 513 U.S. at 324, 115 S. Ct. at 865. To satisfy the *Schlup* standard, a petitioner must show that, in light of all the evidence, including new evidence, it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt. *See Cooper*, 358 F.3d at 1119. A finding that a petitioner has presented sufficient evidence of his "actual innocence" must be based on "new," reliable evidence not presented at trial. *See Schlup*, 513 U.S. at 324-25, 866.

> To be credible, a claim of actual innocence must be based on reliable evidence not presented at trial. Given the rarity of such evidence, *in virtually every case, the allegation of actual innocence has been summarily rejected.*

Calderon v. Thompson, 523 U.S. 538, 559, 118 S. Ct. 1489, 1502-03 (1998) (emphasis added).

Petitioner has not presented supplementary post-trial reliable evidence establishing his is factually innocent. *See Scott v. Lavan*, 190 Fed. App. 196, 198 (3d Cir. 2006); *Sibley v. Culliver*, 377 F.3d 1196, 1206 (11th Cir. 2004). Petitioner has not presented new evidence which, when considered with the evidence offered at trial, establishes that no reasonable juror could have found him guilty. *Compare House*, 547 U.S. at 537-53, 126 S. Ct. at 2077 (holding that the *Schlup* standard was satisfied where new DNA evidence disproved the prime murder motive

of sexual assault, significant issues existed with the collection of other forensic evidence, and new evidence existed that the victim's husband may have confessed to the crime).

Furthermore, Petitioner has not supported his allegations of constitutional error with new reliable evidence, i.e., exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence, that was not presented at trial, which would establish his actual innocence. *See Schlup*, 513 U.S. at 324, 115 S. Ct. at 865.

V Merits of Petitioner's claim that his trial counsel was unconstitutionally ineffective, in violation of Petitioner's Sixth Amendment rights.

Should the Court conclude that the state court's decision was based on the merits of Petitioner's ineffective assistance of trial counsel claims rather than an adequate and independent state procedural bar, or if the Court concludes that Petitioner has shown cause for his procedural default of his ineffective assistance of trial counsel claim, the undersigned concludes the claim may alternatively or additionally be denied on the merits.

To state a claim for ineffective assistance of counsel, a petitioner must show that his attorney's performance was deficient and that the deficiency prejudiced the petitioner's defense. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); *Lambright*, 241 F.3d at 1206. The petitioner must overcome the strong presumption that his counsel's conduct was within the range of reasonable professional assistance required of

attorneys in that circumstance. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064; *Womack v. Del Papa*, 497 F.3d 998, 1004 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 928 (2008). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. Indeed, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable .... " *Id.*, 466 U.S. at 690-91, 104 S. Ct. at 2066.

To succeed on this claim Petitioner must demonstrate his trial counsel's errors rendered the result unreliable or the trial fundamentally unfair. *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S. Ct. 838, 844 (1993); *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. Review of counsel's performance is "highly deferential" and there is a "strong presumption" that counsel rendered adequate assistance and exercised reasonable professional judgment. *See Strickland*, 466 U.S. at 690, 104 S. Ct. 2052. Petitioner must prove both elements of his *Strickland* claim, i.e., both deficient performance and prejudice, to be awarded federal habeas relief on this basis. *See, e.g., Cooper*, 510 F. 3d at 925.

Petitioner's assertions of error by trial counsel involve counsel's alleged failure to present evidence of the victim's inconsistent statements and recantation of her original claim of abuse. The state court found and the undersigned agrees that the decision by counsel to not introduce this evidence was neither deficient nor prejudicial

because further impeachment evidence would have been cumulative, given that the victim's testimony itself was vague and contradictory and the fact that she recanted her allegations on the witness stand. Furthermore, other testimony was introduced of the victim's recantations, including her second forensic interview and the testimony of her grandmother and mother. The jury obviously found the initial video-taped interview of the victim's statement, in addition to the limited physical evidence, to be believable notwithstanding all of the testimony and evidence of recantation. The jury was also presented with evidence regarding the victim's potential motives for allegedly falsely accusing Petitioner including the effective cross-examination of the state's expert and, accordingly, counsel's "failure" to call another expert was not deficient performance nor has Petitioner established that any such error was prejudicial.

VI Conclusion

Petitioner's claim that he was denied his Sixth Amendment right to the effective assistance of trial counsel is procedurally barred because the claim was not properly exhausted in the state courts and Petitioner has not shown cause for, nor prejudice arising from, his procedural default of a Sixth Amendment claim. Petitioner has not shown that review of the merits of his claim is necessary to prevent a fundamental miscarriage of justice or that he is factually innocent of the crimes of conviction.

Alternatively, should the Court conclude that the state court's decision was based on the merits of Petitioner's ineffective assistance of trial counsel claims rather than

an adequate and independent state procedural bar, or if the Court concludes that Petitioner has shown cause for his procedural default of his ineffective assistance of trial counsel claim, the claim may be denied on the merits.

IT IS THEREFORE RECOMMENDED that Mr. Martinez' Petition for Writ of Habeas Corpus be **denied and dismissed with prejudice.**

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4 (a) (1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment.

Pursuant to Rule 72(b), Federal Rules of Civil Procedure, the parties shall have ten (10) days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. Thereafter, the parties have ten (10) days within which to file a response to the objections. Pursuant to Rule 7.2, Local Rules of Civil Procedure for the United States District Court for the District of Arizona, objections to the Report and Recommendation may not exceed seventeen (17) pages in length.

Failure to timely file objections to any factual or legal determinations of the Magistrate Judge will be considered a waiver of a party's right to de novo appellate consideration of the issues. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc). Failure to timely file objections to any factual or legal determinations of the

Appendix C

Magistrate Judge will constitute a waiver of a party's right to appellate review of the findings of fact and conclusions of law in an order or judgment entered pursuant to the recommendation of the Magistrate Judge.

DATED this 16th day of September, 2008.

/s/

Mark E. Aspey
United States Magistrate Judge

APPENDIX D — ARIZONA SUPERIOR COURT RULINGS

IN THE SUPERIOR COURT
PINAL COUNTY, STATE OF ARIZONA

CR99026111

DATE: *11/04/2005*

THE HON GILBERTO V FIGUEROA
Division: 4

Court Reporter: NONE

KRISTI YOUTSEY RUIZ, CLERK
By, *Phyllis Yedica* Judicial Assistant

THE STATE OF ARIZONA,

Plaintiff,

VS.

LUIS MARIANO MARTINEZ,

Defendant(s).

MINUTE ENTRY ACTION:
RULING ON RULE 32 PETITION

This matter was reassigned to this Court for rulings on Defendant Martinez's second Rule 32 Petition. The Court

has now made an exhaustive review of the file, and as deemed necessary or appropriate, of certain transcripts, and FINDS as follows:

1) Defendant Martinez filed his first Notice of Post Conviction Relief through Counsel, Ms. Harriett Levitt, on May 28, 2002.

2) This first filing was made more than 90 days after Entry of Judgment of Guilt, but was filed during the appeal and was therefore, within the prescribed timeline.

3) Thereafter, on February 14, 2003, after numerous extensions, Counsel Levitt filed a Rule 32.4 Notice indicating that she had been unable to identify any colorable claims.

4) The Defendant failed to file a Pro Se supplement and the Court denied all relief and dismissed the Notice on April 28, 2003.

5) The Appeal was reinstated and relief was denied on March 22, 2004 by the Court of Appeals.

6) The Supreme Court denied review on September 22, 2004.

7) The Defendant filed his second Notice of Post Conviction Relief on October 27, 2004.

8) At page 3, paragraph 7 of the most recent Notice, Defendant claims that even though the Notice is NOT TIMELY, it is appropriately filed because "The Defendant's failure to file a timely notice ... was without fault on the Defendant's part." The Defendant then wholly fails to offer any reasonable explanation for claiming the untimely filing is not "his fault."

9) The October 27, 2004 Notice was filed *more than 30 days after* the Arizona Supreme Court denied review on September 22, 2004.

10) Therefore, this Court is compelled to find that the Notice was not timely filed and that Defendant failed to state valid grounds for this Court to find the untimely filing is excusable under Rule 32.1(f);

11) Having noted all of the above, this Court can now summarily dismiss the October 27, 2004 Notice. However, rather than issuing a summary Order of dismissal, this Court will address the two most cogent issues raised by Defendant's Notice dated October 27, 2004 and the Petition filed on February 7, 2005, the Response from the State dated June 29, 2005 and the Defendant's Reply dated July 18, 2005;

12) Counsel has filed and this Court received and reviewed over one hundred (100) pages of Pleadings and exhibits, all of which can be reduced to two (2) basic arguments:

1) Trial counsel was incompetent because:

a) he did not properly prepare for and did not present certain evidence at trial; and

b) he did not prevent certain evidence from being admitted during the trial; and

2) Appellate/Post Conviction Relief counsel was incompetent because she failed to raise the issues noted above;

13) This Court presided over the trial and has reviewed the record and now FINDS:

a) Counsel's arguments do not raise a colorable claim of ineffective assistance of trial counsel, and, in any event, that claim is precluded;

b) Counsel's arguments do not raise a colorable claim of ineffective assistance of appellate/Post Conviction Relief and, in any event, the claim lacks any merit;

c) Counsel failed to raise the one issue that *might* have a chance of resulting in review, (ie., the 8th amendment issue re: the length of the mandatory sentence imposed) even though trial counsel raised the issue at sentencing.

14) First, this Court will address the issue of trial counsel's preparation and trial work. As indicated above, this Court presided over the trial. This Court, along with the jurors, watched and listened as the victim repeatedly responded, "I don't know," or "I don't remember," to question after question from the State. This Court and the jury heard her recantations on the stand and her "impeachment" by her prior statements. Calling witnesses to testify about her recantation or playing a videotape of her defense interview would have been largely cumulative and was not likely to have changed the result. *ST v Salazar*, 146 Az 540, 707 P.2d 944 (App 1974), *ST v Valdez*, 160 Az 9, 770 P.2d 313 (1989). The jury was free to and did believe the victim's original reports. This Court presumes, as it must, that trial counsel exercised his trial strategy and discretion appropriately. *ST v Shurz*, 176 Az 46, 852 P.2d 156 (1993), *Strickland v Washington*, 466 US 668, 104 S. CT 2052, 80 L. Ed 2d (1984).

Likewise, this Court cannot find fault with counsel's decision to forego a "battle of experts" on the Child Sexual Abuse Accommodation Syndrome. Counsel effectively cross-examined Ms. Dutton with respect to what motives a child might have to accuse someone of sexual misconduct. This Court cannot find merit in counsel's extended arguments that an opposing expert could have made a difference. The real issue is whether Ms. Dutton vouched for the victim's credibility. This Court cannot find that Ms. Dutton did so by stating that the literature "tends to suggest" that recantation is "not uncommon." Nor did she comment on the "truthfulness" of the victim when she responded that "Overwhelmingly, the research suggests that lack of support from the mother of the victim is the most common prompt for recantation." Under the circumstances, this Court is comfortable with the fact that the jury had the opportunity to and did weigh the conflicts in the testimony and after approximately eight (8) hours of deliberation, resolved the conflicts in favor of the State and found unanimously that the evidence proved defendant's guilt beyond a reasonable doubt.

15) In stating the foregoing, this Court is mindful that Defendant, his family and now present counsel, have assailed trial

counsel's performance and have strongly criticized Appellate/Post Conviction Relief Counsel Levitt as well. On the other hand, this Court strongly believes that deference is due to the fact that trial counsel had very limited options available to him to deal with the issue of semen on the victim's nightgown. He did a credible job suggesting the victim's mother wore the nightgown or that the semen got on the nightgown when the victim climbed into her mom's bed or when she changed clothes in the bathroom.

16) Even were this Court inclined to do so, this Court cannot find that if trial counsel had done everything suggested by counsel in this Post Conviction Relief, the result would have changed.

17) Based on the foregoing, this Court cannot find that original appellate/PCR counsel's performance fell below the standards set forth in *Strickland*, *Salazar*, *Valdez*, supra.

Therefore, the Court having found that none of the issues raised by counsel present a colorable claim, counsel's request for an evidentiary hearing is DENIED.

Further, this Court having fully reviewed the record and having found the petition untimely,

IT IS ORDERED the Relief requested is DENIED and the Petition is DISMISSED; and,

Appendix D

FURTHER, the Court having considered the arguments of counsel and having found that all issues identified by counsel could have been raised in the original.

PCR and that are therefore precluded, now therefore:

IT IS ORDERED all Relief requested is DENIED and the Petition is DISMISSED; and,

FURTHER, the Court having reviewed the record and having considered all arguments made by counsel, the Court having found no merit for the allegations made; now

THEREFORE, IT IS ORDERED all Relief Requested is **DENIED**, and the Petition for Post Conviction Relief is **DISMISSED**.

Mailed/distributed copy: 11/07/2005

cc:
ROBERT BARTELS

HON. TERRY GODDARD
ATTORNEY GENERAL OF AZ
1275 W. WASHINGTON
PHOENIX, AZ 85007

Office Distribution:
SYLVIA R LAFFERTY
COUNTY ATTORNEY
VICTIMS ASSISTANCE

Appendix D

IN THE SUPERIOR COURT
PINAL COUNTY, STATE OF ARIZONA

CR99026111

DATE: *12/01/2005*

THE HON GILBERTO V FIGUEROA
Division: 4

By, *Phyllis Yedica* Judicial Assistant

THE STATE OF ARIZONA,

Plaintiff,

vs.

LUIS MARIANO MARTINEZ,

Defendant(s).

RULING ON MOTIONS/ISSUES

This Court has reviewed Defendant's Motion for Rehearing; has deemed it a Motion for Reconsideration, and now FINDS and IT IS ORDERED as follows:

1) Defendant's Petition for Post Conviction Relief "filed" on October 27, 2004 at page 3, paragraph 7 (A & B) alleges that Defendant's failure to timely file was without his fault;

2) The Court noted that admission/submission at Finding No. 8 in its November 4, 2005 minute entry;

3) The Court did follow-up regarding Defendant's allegations that he brought the documents to the Clerk of the Court on October 18, 2004 but the Deputy Clerk refused to "file" the Petition without a Judge's approval; and the Court found Defendant's allegations to be accurate and has now taken steps to correct the issue for future filings;

4) Not-with-standing the acknowledgment above, that the Clerk of the Court erred, the Court also notes that the November 4, 2005 minute entry at Pg. 2 of 4, paragraph 11, states the Petition is *not* being summarily *dismissed* as untimely; and

5) The Court DISMISSED the Petition after finding no colorable claims and/or after having found all issues precluded and/or without merit;

6) The Court did find the Notice untimely but considered the issues raised;

THEREFORE, IT IS ORDERED:

1) No Responsive Pleading is required;

2) The issue of timeliness was not a dispositive factor;

3) The Relief requested was denied on multiple grounds, all supported by the record and the law; and

4) The Post Conviction Petition was Dismissed on grounds which are supported by the record; and

NOW THEREFORE, the Motion for Reconsideration is DENIED and all prior Orders, except the FINDING of untimeliness, are AFFIRMED; the timeliness issue is NOT dispositive and does not call for this Court to reverse itself.

DATED THIS 2nd day of December, 2005.

Mailed/distributed copy: 12/02/2005

cc:
ROBERT BARTELS

HON. TERRY GODDARD
ATTORNEY GENERAL OF AZ
1275 W WASHINGTON
PHOENIX, AZ 85007

Office Distribution:
SYLVIA R LAFFERTY

APPENDIX E — UNREPORTED ARIZONA COURT OF APPEALS MEMORANDUM DECISION (AUGUST 31, 2006)

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

2 CA-CR 2006-0001-PR
DEPARTMENT B

MEMORANDUM DECISION
Not for Publication
Rule 111, Rules of
the Supreme Court

THE STATE OF ARIZONA,

Respondent,

v.

LUIS MARIANO MARTINEZ,

Petitioner.

PETITION FOR REVIEW FROM THE
SUPERIOR COURT OF PINAL COUNTY

Cause No. CR99026111

Honorable Gilberto V. Figueroa, Judge

REVIEW GRANTED; RELIEF DENIED

Appendix E

Robert Bartels — Tempe
Attorney for Petitioner

ESPINOSA, Judge.

A jury found petitioner Luis Martinez guilty of two counts of sexual conduct with a minor under the age of fifteen, and the trial court sentenced him to consecutive terms of life imprisonment. This court affirmed Martinez's convictions and sentences on appeal. *State v. Martinez*, No.2 CA-CR 2002-0088 (memorandum decision filed Mar. 22, 2004). While his appeal was pending, Martinez filed a notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S. His appointed attorney later filed a notice saying she could find no issues to raise and requesting that Martinez be permitted to file a pro se petition for post-conviction relief. The trial court granted Martinez permission to file a petition, but Martinez did not do so, and the court eventually denied any relief.

Martinez filed a second notice of post-conviction relief in October 2004. In his post-conviction petition, Martinez claimed trial counsel had been ineffective in failing to introduce certain evidence, object to the admission of evidence, impeach a police officer, and interview prospective witnesses. The trial court ruled the notice had been untimely filed and found the claims precluded but also addressed the claims on their merits and rejected them. After Martinez filed a motion for rehearing, the court reversed its ruling that the notice had been untimely filed but affirmed its remaining rulings. This petition for review followed. We review for an abuse of discretion a trial court's ruling on a petition for post-conviction relief.

State v. *Watton*, 164 Ariz. 323, 793 P.2d 80 (1990). We find no abuse in the court's ruling that Martinez's claims are precluded.

As he did below, Martinez argues his claims are not precluded because his previous Rule 32 counsel was ineffective in failing to raise the claims. He is correct that a defendant may raise a claim of ineffective assistance of counsel in a successive petition for post-conviction relief, but misapplies the rule to his case. A defendant who pleads guilty can only obtain appellate review by filing a post-conviction proceeding. *State v. Pruett*, 185 Ariz. 128, 912 P.2d 1357 (App. 1995). Therefore, a pleading defendant can only challenge the effectiveness of Rule 32 counsel, the equivalent of appellate counsel, in a successive post-conviction proceeding. *Id.* That case is not applicable to Martinez because he did not plead guilty.

Nor is *Halbert v. Michigan*, 545 U.S. 605, 125 S. Ct. 2582 (2005). There, the United States Supreme Court held that a defendant who pleads guilty or *nolo contendere* is entitled to appointed counsel to pursue a first-tier review on appeal despite a state statute providing that such a defendant may appeal only with leave of court. *Id.* As Martinez acknowledges, counsel represented him on appeal and in his first post-conviction proceeding.

In *State v. Herrera*, 183 Ariz. 642, 905 p.2d 1377 (App. 1995), Division One of this court held the trial court had improperly ruled it lacked jurisdiction to hear the defendant's claim that appellate counsel had been ineffective. But, unlike Martinez, that defendant raised the claim in his first post-conviction proceeding, not in a

successive one. *Id.* The same is true of the defendant in *State v. Jackson*, 209 Ariz. 13, 97 P.3d 113 (App. 2004). Because Martinez was granted leave to file a pro se petition for post-conviction relief in his first proceeding, he could have raised a claim then that trial counsel had been ineffective.

Relying on *Stewart v. Smith*, 202 Ariz. 446, ¶ 8, 46 P.3d 1067, 1070 (2002), *quoting* Rule 32.2(a) cmt., Martinez also contends his claims are not precluded because they are "'of sufficient constitutional magnitude'" that he was personally required to waive them. We disagree. The examples the supreme court cited in *Smith* of the types of rights a defendant must personally waive are the right to counsel, the right to a jury trial, and the right to a twelve-person jury. *Id.* ¶ 9. Additional such rights include deciding whether to plead guilty, whether to testify at trial, and whether to appeal. *See Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308 (1983).

Despite his attempt to characterize his ineffective assistance claims as affecting his constitutional rights to confront the witnesses against him or to present evidence in his defense, Martinez's claims about trial counsel's performance instead involve issues of trial error and trial strategy in choosing the evidence to present, the cross-examination to conduct, and the objections to make. *See State v. Meeker*, 143 Ariz. 256, 262, 693 P.2d 911, 917 (1984) ("The decision as to what witness should be called to testify on the defendant's behalf is a tactical strategic decision."); *State v. Rodriguez*, 126 Ariz. 28, 33, 612 P.2d 484, 489 (1980) ("In general, the power to

control trial strategy belongs to counsel."). Because none of those claims involves the types of rights listed in *Smith*, Martinez's failure to personally waive them did not prevent the trial court from finding them precluded.

Because the trial court found the claims were precluded, it was not required to address the claims on the merits. *See* Ariz. R. Crim. P. 32.6(c) (trial court shall dismiss post-conviction petition if it determines no unprecluded claim would entitle defendant to relief). Accordingly, we find no abuse of the court's discretion in finding the claims precluded. *See Watton*. Therefore, we grant the petition for review but deny relief.

/s/
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/
PETER J. ECKERSTROM, Presiding Judge

/s/
J. WILLIAM BRAMMER, Jr., Judge

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (NOVEMBER 5, 2010)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-15170

D.C. No. 2:08-cv-00785-JAT
District of Arizona, Phoenix

LUIS MARIANO MARTINEZ,

Petitioner - Appellant,

v.

DORA SCHRIRO, Director of the Arizona Department of Corrections,

Respondent - Appellee.

ORDER

Before: WALLACE, HUG and CLIFTON, Circuit Judges.

The Petition for Panel Rehearing is DENIED.

Judge Clifton has voted to deny the Petition for Rehearing En Banc, and Judges Wallace and Hug so recommend.

Appendix F

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's Petition for Rehearing En Banc is DENIED.

OPPOSITION BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
APR 6 - 2011
OFFICE OF THE CLERK

No. 10–1001

IN THE
SUPREME COURT OF THE UNITED STATES

LUIS MARIANO MARTINEZ,

Petitioner,

vs.

CHARLES L. RYAN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

THOMAS C. HORNE
Attorney General

DAVID R. COLE
Solicitor General

KENT E. CATTANI
Division Chief
Criminal Appeals/
Capital Litigation Division

MICHAEL T. O'TOOLE
Assistant Attorney General
(Attorney of Record)
Criminal Appeals/
Capital Litigation Division
1275 W. Washington
Phoenix, Arizona 85007–2997
Telephone: (602) 542–4686

QUESTION PRESENTED

Whether a federal habeas petitioner can establish "cause" for the procedural default of an ineffective-assistance-of-trial-counsel claim by alleging ineffective assistance of state-collateral-review counsel.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED FOR REVIEW i
TABLE OF AUTHORITIES iii
STATEMENT OF THE CASE 1
SUMMARY OF ARGUMENT 3
REASONS NOT TO GRANT THE WRIT 5
CONCLUSION 25
APPENDIX A A-1
APPENDIX B B-1

TABLE OF AUTHORITIES

CASES	PAGE
Bonin v. Vasquez, 999 F.2d 425 (9th Cir. 1993)	13
Callins v. Johnson, 89 F.3d 210 (5th Cir. 1996)	19
Canion v. Cole, 115 P.3d 1261 (Ariz. 2005)	18
Coleman v. Thompson, 501 U.S. 722 (1991)	passim
Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458 (1981)	19
Custer v. Hill, 378 F.3d 968 (9th Cir. 2004)	24
Dist. Attorney's Office for Third Judicial Dist. v. Osborne, ___ U.S. ___, 129 S. Ct. 2308 (2009)	17-18
Douglas v. People of State of Cal., 372 U.S. 353 (1963)	9, 10
Edwards v. Carpenter, 529 U.S. 446 (2000)	passim
Evitts v. Lucey, 469 U.S. 387 (1985)	9, 16
Gosier v. Welborn, 175 F.3d 504 (7th Cir. 1999)	21
Gray v. Netherland, 518 U.S. 152 (1996)	3, 5, 6
Halbert v. Michigan, 545 U.S. 605 (2005)	9
Harrington v. Richter, ___ U.S. ___, 131 S. Ct. 770 (2011)	12
Henderson v. Campbell, 353 F.3d 880 (11th Cir. 2003)	21
Herrera v. Collins, 506 U.S. 390 (1993)	17
Jimenez v. Florida Dep't of Corr., 481 F.3d 1337 (11th Cir. 2007)	21
Johnson v. Avery, 393 U.S. 483 (1969)	9, 16
Johnson v. McDonough 480 F. Supp. 2d 1309 (S.D. Fla. 2007)	21, 22
Lawrence v. Florida, 549 U.S. 327 (2007)	9, 16, 19, 25
Lopez v. Schriro, 491 F.3d 1029 (9th Cir. 2007)	6
Martinez v. Court of Appeal of California, Fourth Appellate Dist., 528 U.S. 152 (2000)	8

Martinez v. Schriro, 623 F.3d 731 (9th Cir. 2010) ..... passim
McCleskey v. Zant, 499 U.S. 467 (1991) 7, 22
Murray v. Giarratano, 492 U.S. 1 (1989) ... 9, 12, 16, 19
Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998) 15
Pennsylvania v. Finley, 481 U.S. 551 (1987) ..... passim
Post v. Bradshaw, 422 F.3d 419 (6th Cir. 2005) 21
Ross v. Moffitt, 417 U.S. 600 (1974) 10, 11
Skinner v. Switzer, 562 U.S. ___ (2011) 17
Smith v. Baldwin, 510 F.3d 1127 (9th Cir. 2007) 24
Smith v. Robbins, 528 U.S. 259 (2000) 15, 24
State v. Smith, 910 P.2d 1 (Ariz. 1996) 23
Strickland v. Washington, 466 U.S. 668 (1984) 13, 15, 16
Swarthout v. Cooke, ___ U.S. ___, 131 S. Ct. 859 (2011) 19, 20
Teague v. Lane, 489 U.S. 288 (1989) 22
Wainwright v. Sykes, 433 U.S. 72 (1977) 7
Walker v. Martin, ___ U.S. ___, 131 S. Ct. 1120 (2011) 6
Williams v. Taylor, 529 U.S. 362 (2000) 21

Statutes

28 U.S.C. § 2244(d)(1) 14
28 U.S.C. § 2244(d)(2) 15
28 U.S.C. § 2254 24
28 U.S.C. § 2254(i) 20, 21, 23, 24

Rules

Ariz. R. Crim. P. 32.2(a) 6
Ariz. R. Crim. P. 32.4(a) 18
Ariz. R. Crim. P. 32.4(c) 18
Ariz. R. Crim. P. 32.4(c)(2) 18, 23

Ariz. R. Crim. P. 32.4(d) 18
Ariz. R. Crim. P. 32.8 18
Ariz. R. Crim. P. 32.9(c) & (g) 18
Sup. Crt. R. 14.1(a) 24

STATEMENT OF THE CASE

Petitioner was charged and convicted of two counts of sexual conduct with a person under the age of fifteen. *Martinez v. Schriro*, 623 F.3d 731, 733 (9th Cir. 2010). After his convictions were affirmed on direct appeal, the Arizona trial court appointed counsel to pursue collateral relief under Arizona Rule of Criminal Procedure 32.4. *Id.* at 733–34. Petitioner's counsel filed a "Notice of Post-Conviction Relief" to initiate the proceedings, but subsequently indicated she had "reviewed the transcripts and trial file and [could] find no colorable claims" to raise. *Id.* at 734. Counsel requested that Petitioner be granted additional time to file a *pro per* post-conviction relief petition. *Id.* The trial court granted the request, but Petitioner did not file a petition. *Id.* The trial court dismissed the post-conviction relief proceeding after the time for filing the petition had expired. *Id.*

Over a year later, Petitioner, through new counsel, filed a second notice of post-conviction relief, and subsequently, he filed a petition in support of that notice, asserting that his trial counsel rendered ineffective assistance of counsel in violation of the Sixth Amendment. *Id.* The Arizona trial court dismissed the petition, finding Petitioner's claims were precluded under the Arizona Rules of Criminal Procedure. *Id.* The Arizona Court of Appeals affirmed the trial court's finding of preclusion, rejecting Petitioner's contention that his claims should not be precluded because his prior post-conviction-relief

counsel was ineffective.[1] (Petitioner's Appendix ["Pet. App.], at 80a–81a.) The Arizona Supreme Court subsequently summarily denied review. *Martinez*, 623 F.3d at 734.

On April 24, 2008, Petitioner filed a federal petition for writ of habeas corpus, contending that his trial counsel rendered ineffective assistance of counsel in violation of the Sixth Amendment. *Id.* The district court ruled that Petitioner's claims were procedurally defaulted, and that Petitioner had not shown cause for the default. *Id.* Accordingly, the court denied the petition. *Id.*

On September 27, 2010, the Ninth Circuit Court of Appeals affirmed the dismissal of Petitioner's habeas action, concluding: (1) the Arizona trial court's finding of preclusion resulted in a procedural default of Petitioner's claims that his trial counsel was ineffective; and (2) Petitioner could not show "cause and prejudice" for his default because there is no federally-recognized right to the assistance of counsel in post-conviction or collateral review proceedings. *Id.* at 735–43.

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[1] Petitioner contends that, in his second post-conviction relief proceeding, he exhausted a claim that his first post-conviction-relief counsel was constitutionally ineffective. (Petition, at 5 n.4.) Petitioner only asserted that claim, however, as a basis for his contention that his ineffective-assistance-of-trial-counsel claims should not be precluded. (Respondents' Appendix ["Resp. App."], at A28–A 31 [post-conviction relief petition]; *id.* at B2, B16–B20 [petition for review in the Arizona Court of Appeals].)

On November 5, 2010, the Court of Appeals denied Petitioner's timely petition for rehearing and rehearing en banc. (Pet. App., at 84a–85a.)

SUMMARY OF ARGUMENT

The petition for certiorari does not assert a split among the lower courts or otherwise raise a question that warrants review by this Court. Petitioner first argues that Arizona's rule barring claims that could have been raised in a prior post-conviction proceeding was not an "adequate" ground under the "adequate and independent" doctrine. (Petition, at 9–11.) This Court, however, has already held that a dismissal on this ground is an adequate ground for denying a claim. *Gray v. Netherland*, 518 U.S. 152, 161–62 (1996). Petitioner has not established a compelling basis for this Court to revisit this issue.

Petitioner's second argument is that he should be able to establish "cause" for his procedurally-defaulted ineffective-assistance-of-trial counsel claims by demonstrating that he received ineffective assistance of counsel during his first state collateral-review proceeding. (Petition, at 11–21.) However, in order for the ineffectiveness of counsel to constitute cause for a procedural default, a habeas petitioner must show that counsel's ineffectiveness amounted to a constitutional violation. This Court has properly determined that there is no federal constitutional right to counsel in collateral-review proceedings. A defendant is entitled to counsel to conduct the main event—the trial. The fact that Arizona provides counsel in collateral review to evaluate the "main event" does not establish a right

to constitutionally effective counsel. Further, recognizing any such right would necessarily involve a right to a second collateral-review proceeding to evaluate the performance of a defendant's first collateral-review counsel, which would take us even further away from the trial itself.

Moreover, even if Petitioner could establish a constitutional right to the effective assistance of collateral-review counsel, he still could not show cause for his procedural default because the recognition of such a right would amount to a "new rule," which may not be the basis for a federal collateral attack on a state-court conviction.

Finally, even if it is assumed that Petitioner did have a right to the effective assistance of counsel in his state collateral-review proceeding, and further assuming that recognizing such a right would not establish a "new rule," he still cannot show cause for his procedural default because, after his counsel filed a notice that she could not find any colorable claim to raise, Petitioner had an opportunity to file a *pro per* petition. Petitioner, therefore, bears the ultimate responsibility for not raising his ineffective-assistance-of-trial-counsel claims.

REASONS NOT TO GRANT THE WRIT

I. The State Court Finding of Preclusion was An "Adequate and Independent" Reason to Deny Petitioner's Claims That His Trial Counsel Was Ineffective.

In addition to failing to demonstrate a split among the lower courts, the petition for certiorari does not raise a question that warrants review by this Court. Petitioner first asserts that the procedural ground on which the state court denied his federal claims was not "adequate" under the adequate and independent state law doctrine. (Petition, at 8.) When the Arizona trial court considered Petitioner's second post-conviction relief petition, however, it concluded, *inter alia*, that Petitioner's claims that his trial counsel was ineffective were precluded because Petitioner did not present them in his original post-conviction relief proceeding. (Pet. App., at 68a–78a.) The Arizona Court of Appeals affirmed the trial court's dismissal of Petitioner's second post-conviction proceeding, concluding that the trial court did not abuse its discretion when it found Petitioner's claims were precluded. (Pet. App. at 80a–81a.) This finding of preclusion constitutes an independent and adequate state ground that bars federal habeas review. *See Gray*, 518 U.S. at 161–62 (state-court finding that claims in second post-conviction petition were precluded because they could have been raised in first petition constituted adequate and independent grounds for denying relief).

Petitioner asserts that the finding of preclusion was not an "adequate" ground for denying his claims because it frustrated his ability to bring a claim that

his collateral-review counsel was ineffective, and prevented him from raising his underlying ineffective-assistance-of-trial-counsel claims. (Petition, at 9.) As noted above, however, in his second post-conviction relief petition, Petitioner did not raise a separate claim that his collateral-review counsel was ineffective; he merely argued that his ineffective-assistance-of-trial counsel claims were not precluded because of the alleged ineffectiveness of his collateral-review counsel. (Resp. App., at A28–A31; B2, B16–B20.) The finding of preclusion, therefore, only related to Petitioner's ineffective-assistance-of-trial-counsel claims. (Pet. App., at 80a–81a.) Because the "adequacy" of the preclusion finding in this case concerns only Petitioner's underlying ineffective-assistance-of-trial-counsel claims, it is clear that this finding was an adequate ground for denying Petitioner's claim. *See Walker v. Martin*, ___ U.S. ___, 131 S. Ct. 1120, 1127–28 (2011) (stating that a finding of preclusion is an adequate ground for denying relief if it is "firmly established and regularly followed")

This Court has previously concluded that a state-court finding that a claim was precluded because it was not raised in a prior post-conviction relief proceeding is an adequate and independent ground for denying habeas relief. *Gray*, 518 U.S. at 161–62; *see also Lopez v. Schriro*, 491 F.3d 1029, 1043 n.11 (9th Cir. 2007) (referring to the application of Arizona Rule of Criminal Procedure 32.2(a) as an "independent and adequate" state law ground for denying habeas relief).

Petitioner does not challenge any of the above authority holding that a state-court finding of

preclusion is an adequate and independent ground for denying a habeas claim; instead, he complains that the finding of preclusion in this case frustrated his right to assert a claim that his trial counsel was ineffective. (Petition, at 9.) That, however, is a natural consequence of this Court's recognition that a state-court finding of procedural default constitutes an adequate and independent ground for denying habeas relief. *Coleman v. Thompson*, 501 U.S. 722, 732 (1991) (stating that without the adequate and independent state ground doctrine, habeas petitioners would be able to take "an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws"); *see also McCleskey v. Zant*, 499 U.S. 467, 490–91 (1991) (stating that the doctrine of procedural default flows "from the significant costs of federal habeas corpus review," which strikes at the important interest of "finality," and "places a heavy burden on scarce federal judicial resources, and threatens the capacity of the system to resolve primary disputes"); *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977) ("We believe the adoption of the [adequate and independent ground] rule in [habeas proceedings] will have the salutary effect of making the state trial on the merits the 'main event,' so to speak, rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing.").

II. Petitioner Has Not Established Cause for His Procedural Default Because There is No Constitutional Right to Effective Assistance of Counsel During Collateral Review.

The Court of Appeals correctly held that recognizing

a right to counsel in collateral-review proceedings would be an unwarranted expansion of this Court's precedent. Further, the fact that Arizona has enacted procedures to allow criminal defendants to challenge their convictions in collateral-review proceedings does not entitle Petitioner to "effective" assistance of counsel under either the Sixth or Fourteenth Amendments; instead, any right to counsel was fulfilled by the state's appointment of counsel. Thus, because Petitioner did not have a right to constitutionally-effective counsel during his post-conviction proceeding, any theoretical deficiencies in his counsel's performance during that proceeding should not be deemed to provide cause for the procedural default of his ineffective-assistance-of-trial-counsel claims. *Coleman*, 501 U.S. at 757.

A. There is no constitutional right to the assistance of counsel at collateral-review proceedings.

In order for the ineffective assistance of collateral-review counsel to constitute cause for the procedural default of an ineffective-assistance-of-trial-counsel claim in state court, a habeas petitioner must establish that the alleged ineffectiveness of collateral-review counsel "*itself* [is] an independent constitutional claim." *Edwards v. Carpenter*, 529 U.S. 446, 452 (2000). There is no constitutional right to collateral-review counsel, and, thus, Petitioner cannot establish cause for his default.

As an initial matter, it is well-established that the Sixth Amendment only applies to trial rights. *See Martinez v. Court of Appeal of California, Fourth Appellate Dist.*, 528 U.S. 152, 159–60 (2000) (stating

that the rights enumerated in the Sixth Amendment "are presented strictly as rights that are available in preparation for trial and at the trial itself").

Furthermore, there is no generally-recognized right to counsel in post-conviction proceedings. *Coleman*, 501 U.S. 756–77; *Pennsylvania v. Finley*, 481 U.S. 551, 555–59 (1987); *Johnson v. Avery*, 393 U.S. 483, 488 (1969). This is true even in capital cases. *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (plurality); *see also Lawrence v. Florida*, 549 U.S. 327, 336–37 (2007) (stating, in a capital case, that "[a]ttorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the postconviction context where prisoners have no constitutional right to counsel"). Petitioner recognizes this, but argues his post-conviction relief proceeding was the functional equivalent of a first direct appeal, and, thus, he was entitled to counsel based on this Court's decisions in *Halbert v. Michigan*, 545 U.S. 605 (2005), and *Douglas v. People of State of Cal.*, 372 U.S. 353 (1963). (Petition, at 13–19.) As the Court of Appeals correctly concluded, however, Petitioner's case is not sufficiently analogous to *Halbert* or *Douglas* to justify creating an exception to the rule that there is no right to counsel in collateral proceedings. *Martinez*, 623 F.3d at 736–40.

In *Douglas*, this Court held that the right to due process and equal protection requires states to provide indigent criminal defendants counsel for their "first appeal" in state court. 372 U.S. at 355–56; *see also Evitts v. Lucey*, 469 U.S. 387, 396 (1985) (holding that the right recognized in *Douglas* includes the right to effective assistance of counsel). In *Halbert*, the Court

extended *Douglas* to require the appointment of counsel for defendants who plead guilty and waive their right to direct appeal, but nonetheless retained their ability to seek discretionary review of their convictions in the state court of appeals. 545 U.S. at 610–22. Crucial to the determination that *Douglas* required the appointment of counsel was the fact the state court of appeals' ruling on a defendant's claim provided "the first, and likely the only, direct review the defendant's conviction and sentence will receive." *Id.* at 619. Petitioner had a counseled direct appeal; and, thus, neither *Douglas* nor *Halbert* supports the contention that Petitioner was constitutionally entitled to counsel for his first-post conviction relief proceeding. *Martinez*, 623 F.3d at 740.

Instead, Petitioner's case is more analogous to *Ross v. Moffitt*, 417 U.S. 600 (1974). There, the Court concluded that a state is not required to appoint counsel for a criminal defendant beyond a first appeal. 417 U.S. at 610–19. After acknowledging that a state need not provide a criminal defendant an appeal at all, *Ross* rejected the notion that due process required the appointment of counsel merely because a state provided the right to appeal. *Id.* at 610–11. The Court also rejected the suggestion that the equal-protection right recognized in *Douglas* applies to all state proceedings that allow criminal defendants to challenge their convictions. *See id.* at 612 ("Despite the tendency of all rights 'to declare themselves absolute to their logical extreme,' there are obviously limits beyond which the equal protection analysis may not be pressed without doing violence to principles

recognized in other decisions of this Court.") (footnote omitted).

Ross concluded that an indigent defendant was not denied meaningful access to the courts when he was not appointed counsel to assist him in seeking discretionary review. *Id.* at 615. By that time, the defendant had already received "the benefit of counsel in examining the record of his trial and in preparing an appellate brief," and, thus, "prior to his seeking discretionary review in the State Supreme Court, his claims had 'once been presented by a lawyer and passed upon by an appellate court.'" *Id.* at 614–15 (quoting *Douglas*, 372 U.S. at 356.) And, of course, nothing prevented the defendant—who had access to the trial transcripts, the appellate brief, and other materials—from petitioning for further review himself. *Ross*, 417 U.S. 615. As in *Ross*, Petitioner already had a counseled direct appeal, and, thus, Arizona was not constitutionally required to appoint him collateral-review counsel. *Martinez*, 623 F.3d at 740; *see also Finley*, 481 U.S. at 557 (noting that States have no obligation to provide post-conviction relief proceedings, "and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well").

Petitioner contends that he was entitled to counsel to raise his ineffective-assistance-of-trial counsel claims because those claims could not have been raised on direct appeal. (Petition, at 14–15.) Notably, however, when this Court rejected the notion that there was a right to collateral-review counsel in the capital context, it did so despite the dissent's complaint

that ineffective-assistance-of-counsel claims could usually not be raised on direct appeal. *Giarratano*, 492 U.S. at 24 (Stevens, J., dissenting) (noting that claims of ineffective-assistance-of-counsel claims could not be raised on direct appeal under the state law at issue).

Moreover, claims of ineffective assistance are fundamentally different than record-based claims raised on direct appeal because they essentially reflect a defendant's second chance to raise—using ineffective assistance of counsel as a conduit—issues that should have been pursued at trial. In other words, even ineffective-assistance-of-trial-counsel claims are essentially collateral to the conviction and sentence because they do not seek to upset a verdict or sentence by showing error in the record; they seek reversal by attempting to relitigate what has already been litigated. *Cf. Finley*, 481 U.S. at 559 (stating that a defendant in a post-conviction relief proceeding is in a "fundamentally different position" than a defendant who is on trial or pursuing a first appeal as of right). They are also different than record-based claims because they "can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial . . . ." *Harrington v. Richter*, ___ U.S. ___, 131 S. Ct. 770, 788 (2011).

Also, given the "strong presumption" that a trial attorney's assistance is reasonable and the temptation for a "defendant to second-guess counsel's assistance after [a] conviction or adverse sentence," this Court has cautioned against allowing "intrusive post-trial inquiry" of a trial counsel's performance, which can result in "a second trial, this one of counsel's

unsuccessful efforts." *Strickland v. Washington*, 466 U.S. 668, 689–90 (1984) (citation and internal quotation marks omitted). Recognizing a right to counsel in collateral-review proceedings to attack trial counsel's performance would often result in a *third* trial, this one of collateral-review counsel's unsuccessful efforts in the "second trial" (*i.e.*, the first collateral-review proceeding) to establish that performance of the defendant's counsel in his first trial was constitutionally deficient.

Recognizing a constitutional right to the effective-assistance-of-collateral-review counsel would require at least two collateral-review proceedings after direct appeal, the second one to attack first collateral-review-counsel's performance. Further, if a criminal defendant were deemed to have a constitutional right to counsel in a first collateral-review proceeding merely because he could not have previously raised his ineffective-assistance-of-trial-counsel claims, he would presumably have a right to counsel in a subsequent proceeding because *that* proceeding would be the first place he could raise a claim that his second collateral-review counsel was ineffective; and so on, and so on. *See Martinez*, 623 F.3d at 742 (declining to adopt an exception to the general rule that there is no right to counsel in collateral proceedings for claims of ineffective-assistance-of-trial counsel because "this exception would swallow the general rule"); *see also Bonin v. Vasquez*, 999 F.2d 425, 429 (9th Cir. 1993) (noting that recognizing a right to effective assistance of counsel in a first post-conviction relief proceeding to raise claims that trial counsel was ineffective would logically result in "an infinite continuum of litigation

in many criminal cases").

Petitioner argues that the Court of Appeals' concern of an "infinite continuum of litigation is understandable," but unfounded because: (1) a challenge to the effectiveness of the performance of the attorney attacking the collateral-review counsel's performance would amount to a "**second**-tier review of the effectiveness of trial counsel," which he acknowledges is not cognizable; and (2) it would be unlikely that a federal habeas petitioner "could work his way through several tiers of state post-conviction review without running afoul of the one-year statute of limitation for federal habeas cases [as set forth in] 28 U.S.C. § 2244(d)(1)." (Petition, at 20, original emphasis, footnote omitted.) As noted above, however, in order to constitute cause for a procedural default, a claim must be presented as a separate claim. *Carpenter*, 529 U.S. at 451. Thus, a claim that collateral-review counsel was ineffective would have to be asserted not during a "second-*tier* review," but as an independent claim in a second collateral-review proceeding. Further, Petitioner's second point fails to acknowledge that 28 U.S.C. § 2244(d)(2) allows for the tolling of the 1-year limitations period while a timely-initiated state post-conviction relief proceeding is pending.

Finally, Petitioner contends that even if there would be "some habeas cases involving multi-level ineffective-assistance claims, that would not justify denying the constitutional right" to the effective assistance of collateral-review counsel because the failure to recognize such a right would render the right

to effective assistance of trial counsel "an abstract right." (Petition, at 21.) Petitioner's assertion, however, presumes that appointed collateral-review attorneys will, as a matter of course, fail to execute their obligations under state law. There is no basis for any such presumption. *Cf. Smith v. Robbins*, 528 U.S. 259, 286 (2000) ("[W]here, as here, the defendant has received appellate counsel who has complied with a valid state procedure for determining whether the defendant's appeal is frivolous, and the State has not at any time left the defendant without counsel on appeal, there is no reason to presume that the defendant has been prejudiced."); *Strickland*, 466 U.S. at 689 (trial counsel is presumed to have rendered professional assistance). Moreover, Petitioner's contention—taken to its logical conclusion—would require the type of infinite litigation the Court of Appeals referred to; that is, in order to make the right to effective-assistance-of-collateral-review counsel an "effective" right, not an "abstract" one, a defendant would necessarily need the right to the effective assistance of a second collateral-review counsel to ensure that his prior counsel was effective, and so forth, and so forth. *Cf. Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 284 (1998) (noting that, despite the fact the Court has found a right to counsel on direct appeal, other decisions of the Court "make clear that there is no continuum requiring varying levels of process at every conceivable phase of the criminal system").

B. Petitioner's state-created procedural right to collateral-review counsel did not create a right to "effective" assistance of counsel.

Petitioner's argument that he can show cause for his procedural default assumes not only that he had a constitutional right to counsel in his collateral-review proceeding, but that he has a constitutional right to the *effective* assistance of that counsel. *See Carpenter*, 529 U.S. at 451 (stating that "[n]ot just any deficiency in counsel's performance" may constitute cause for a procedural default; instead "the assistance must have been so ineffective as to violate the Federal Constitution"). There is no such right.

The right to effective assistance of counsel under the Sixth Amendment is limited to the assistance of effective trial counsel. *Strickland*, 466 U.S. at 686. Subsequently, this Court found that, although criminal defendants do not have a constitutional right to appeal, they have a due-process right to the effective assistance of appellate counsel if the state provides an appeal. *Evitts*, 469 U.S. at 396–97. The Court, however, has never extended this right to post-conviction relief proceedings, because—as discussed above—it has consistently held there is no right to counsel in that context. *Lawrence*, 549 U.S. at 336–37; *Coleman*, 501 U.S. 756–77; *Giarratano*, 492 U.S. at 10; *Finley*, 481 U.S. at 555–59; *Johnson*, 393 U.S. at 488.

Further, because there is no substantive right to collateral post-conviction relief proceedings, any contention that a state post-conviction review process violates due process must be based on a claim of

"procedural due process." *See Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, ___ U.S. ___, 129 S. Ct. 2308, 2312, 2316–22 (2009) (concluding that because convicted prisoner did not have a substantive right to DNA testing, his claim that he was denied access to testing necessarily involved a claim of procedural due process). Given the wide discretion states are afforded in enacting post-conviction review legislation, a procedural due process challenge in this context faces a formidable hurdle. *See Finley*, 481 U.S. at 559 (rejecting the contention that "when a State chooses to offer help to those seeking relief from [their] convictions, the Federal Constitution dictates the exact form such assistance must assume"). Thus, "[f]ederal courts may upset a State's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided." *Osborne*, 129 S. Ct. at 2320; *see also Skinner v. Switzer*, 562 U.S. ___ , ___ (2011) (slip op., at 2) (stating that the Court's analysis in *Osborne* "left slim room for the prisoner to show that the governing state [post-conviction procedure] denies him procedural due process"). *Cf. Herrera v. Collins*, 506 U.S. 390, 399 (1993) (noting that due process "does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person," because "[t]o conclude otherwise would all but paralyze our system for enforcement of the criminal law").

The procedures Arizona follows in collateral post-conviction relief proceedings are not "fundamentally inadequate to vindicate" a defendant's right to challenge his conviction or sentence. *Osborne*, 129 S.

Ct. at 2320. First, the procedures provide that a defendant may initiate a proceeding with a simple "notice of post-conviction relief." Ariz. R. Crim. P. 32.4(a). Secondly, after that notice is filed, a defendant is appointed counsel if it is his first post-conviction relief proceeding. Ariz. R. Crim. P. 32.4(c). A defendant is also provided cost-free transcripts of the relevant trial proceedings. Ariz. R. Crim. P. 32.4(d). Discovery is available after a petitioner has filed a petition outlining his claims. *Canion v. Cole*, 115 P.3d 1261, 1263, ¶¶ 10–11 (Ariz. 2005). If the petitioner states a colorable claim for relief, an evidentiary hearing is held. Ariz. R. Crim. P. 32.8. Additionally, if appointed counsel fails to find a colorable claim to pursue, the defendant is provided additional time to file a *pro per* petition, with his former counsel acting as advisory counsel. Ariz. R. Crim. P. 32.4(c)(2). Furthermore, if a petition is denied, the defendant may petition for review in the Arizona Court of Appeals and, after that, in the Arizona Supreme Court. Ariz. R. Crim. P. 32.9(c) & (g).

These procedures plainly provide an Arizona defendant a constitutionally-adequate avenue to vindicate the underlying state-created right, *i.e.*, the right to have the Arizona courts hear his claims.

By appointing counsel for defendants in their first collateral-review proceedings, Arizona has created a sufficient procedure to allow defendants to present their challenges in a collateral-review proceeding. *See Osborne*, 129 S. Ct. at 2320 ("We see nothing inadequate about the procedures Alaska has provided to vindicate its state right to postconviction relief in

general, and nothing inadequate about how those procedures apply to those who seek access to DNA evidence."); *Giarratano*, 492 U.S. at 14–15 (Kennedy, J., concurring) (concluding that due process was satisfied where capital defendants had access to prison's "institutional lawyers" to assist them in preparing their post-conviction relief petitions); *Finley*, 481 U.S. at 559 (holding that state-court procedures for providing prisoners access to post-conviction review were constitutionally adequate, even though the procedures did not provide for the appointment of counsel); *see also Callins v. Johnson*, 89 F.3d 210, 212–13 (5th Cir. 1996) (noting that the mere fact that state prisoner was appointed counsel in his first federal capital habeas petition did not mean that he had a right to constitutionally effective counsel in that proceeding).

Moreover, when determining whether there is a violation of procedural due process, a federal court looks at the procedures in general and not whether in the court's opinion the procedures produced a fair result. *See, e.g., Swarthout v. Cooke*, ___ U.S. ___, 131 S. Ct. 859, 862 (2011) (stating that where parolees received the procedures they were constitutionally entitled to, "[t]hat should have been the beginning and the end of the federal habeas courts' inquiry into whether [they] received due process"); *Lawrence*, 549 U.S. at 337 ("[A] State's effort to assist prisoners in postconviction proceedings does not make the State accountable for a prisoner's delay."); *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 467 (1981) ("We hold that the power vested in the Connecticut Board of Pardons [under state law] to commute sentences

conferred no rights on respondents beyond the right to seek commutation."). Instead, once it is established that the required procedures themselves were followed, any error in the proceedings would be a "mere error of state law," "not a denial of due process." *Cooke*, 131 S. Ct. at 863 (quoting *Engle v. Isaac*, 456 U.S. 107, 121, n.21 (1982)).

In sum, assuming *arguendo* Petitioner had a right to counsel in his collateral-review proceeding to raise ineffective-assistance-of-trial-counsel claims, that right was a state-created right, which did not entail the further right to the "constitutionally effective assistance of counsel" under either the Sixth or Fourteenth Amendments; instead, Arizona's obligation to Petitioner was fulfilled by the appointment of counsel. *See Finley*, 481 U.S. at 558 ("Since respondent has received exactly that which she is entitled to receive under state law—an independent review of the record by competent counsel—she cannot claim any deprivation without due process.").

Furthermore, a conclusion that a defendant may allege ineffective assistance of collateral-review counsel as cause to excuse a procedural default would be inconsistent with Congress's prohibition on granting relief on any such claim. *See* 28 U.S.C. § 2254(i) ("The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254."). This is because, in order to reach the underlying claim, a habeas petitioner would first have to establish, as an independent violation, that his collateral-review counsel was ineffective.

Carpenter, 529 U.S. at 452. Thus, before determining whether the petitioner's underlying claim is valid, a federal court would have to rule on the merits of the petitioner's claim of ineffective-collateral-review-counsel, which would amount to granting relief on that claim. *See Jimenez v. Florida Dep't of Corr.*, 481 F.3d 1337, 1343 (11th Cir. 2007) ("[Petitioner] asserted the ineffective assistance of his state-appointed counsel in his post-conviction proceedings deprived him of his state-created right to full and fair state post-conviction process. Section 2254 explicitly bars this claim."); *Post v. Bradshaw*, 422 F.3d 419, 423 & n.1 (6th Cir. 2005) (holding that § 2254(i) bars all types of "relief," not just relief on the merits of a habeas petition); *Henderson v. Campbell*, 353 F.3d 880, 892 (11th Cir. 2003) (concluding that § 2254(i) bars a habeas petitioner from claiming ineffective assistance of counsel in post-conviction proceedings as "cause" for a procedural default); *Gosier v. Welborn*, 175 F.3d 504, 511 (7th Cir. 1999) (stating that § 2254(i) means "that counsel's errors in post-conviction proceedings cannot supply the 'cause' that would relieve a defendant of his forfeitures").

Moreover, even assuming a finding of ineffective-assistance-of-collateral-review-counsel constitutes only "cause," and not "relief" under § 2241(i), the principal harm that statute seeks to avoid—litigation of collateral proceedings—would necessarily ensue. *See Williams v. Taylor*, 529 U.S. 362, 386 (2000) (opinion of Stevens, J.) (stating that by enacting the Antiterrorism and Effective Death Penalty Act of 1996, the "AEDPA," "Congress wished to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to

the extent possible under law"); *see also Johnson v. McDonough*, 480 F. Supp. 2d 1309, 1313 (S.D. Fla. 2007) (noting that "Congress added 28 U.S.C. § 2254(i) when it enacted the AEDPA").

III. *Teague* Prevents Petitioner from Establishing Cause Based on any Newly-Recognized Right to Collateral-Review Counsel.

Even if Petitioner could somehow establish that he was constitutionally entitled to the effective assistance of collateral-review counsel to raise an ineffective-assistance-of-trial-counsel claim, Petitioner would still not be able to show cause because this would amount to a "new rule," which would not be applicable to Petitioner's case.[2] *Teague v. Lane*, 489 U.S. 288, 305–11 (1989). *Cf. McCleskey v. Zant*, 499 U.S. 467, 495 (1991) (stating that the "[a]pplication of the cause and prejudice standard in the abuse-of-the-writ context does not mitigate the force" of *Teague's* rule, "which prohibits, with certain exceptions, the retroactive application of new law to claims raised in federal habeas").

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[2] Any "new rule" would only affect collateral-review proceedings, and, thus, would not fall within *Teague's* exceptions for: (1) rules placing certain types of conduct "beyond the power of the criminal law–making authority to proscribe"; and (2) "watershed rules of criminal procedure" that affect the accuracy of the criminal proceeding. 489 U.S. at 311–12.

IV. Petitioner Cannot Show Cause for His Default Because Ultimately He Was Personally Responsible for Any Default.

Finally, Petitioner cannot show cause because—even if he had a right to the effective collateral-review counsel to raise ineffective-assistance-of-trial-counsel claims in his first post-conviction relief proceeding—Petitioner himself was ultimately the cause for the procedural default. As discussed above, if an Arizona defendant's appointed counsel concludes there are no colorable issues to raise in a post-conviction relief proceeding, the defendant has the opportunity to pursue a *pro se* petition where, *inter alia*, claims of ineffective-assistance-of-counsel claims may be raised. Ariz. R. Crim. P. 32.4(c)(2); *see also State v. Smith*, 910 P.2d 1, 4 (Ariz. 1996) ("If, after conscientiously searching the record for error, appointed counsel in a [post-conviction relief] proceeding finds no tenable issue and cannot proceed, the defendant is entitled to file a pro per [post-conviction relief].").

Petitioner acknowledges there is no right to counsel beyond a first collateral-review proceeding. (Petition, at 21, n.11.) And, although Petitioner contends that he should be able to attack the performance of his first collateral-review counsel in a second post-conviction proceeding, the simplest way for Petitioner to have asserted what he claims are "valid" ineffective-assistance-of-trial-counsel claims would have been to raise those claims directly in a *pro per* petition after his counsel notified the trial court that she could not find any colorable issues to raise. That way, the validity of the claims could be addressed without

Petitioner first having to establish that his collateral-review counsel's performance was "objectively unreasonable." *Robbins*, 528 U.S. at 285.

Thus, assuming *arguendo* Petitioner's appointed counsel erred when she concluded there were no colorable issues to raise, there still is no cause because Petitioner himself is responsible for any error in failing to raise ineffective-assistance-of-counsel claims during his first post-conviction relief proceeding.[3] *Coleman*, 501 U.S. at 753–54 (cause is not established where failure to present claim is attributable to the defendant himself); *see also Smith v. Baldwin*, 510 F.3d 1127, 1146–47 (9th Cir. 2007) (stating that the alleged errors by petitioner's collateral-review counsel did not prevent the petitioner from raising his substantive post-conviction claims himself); *Custer v. Hill*, 378 F.3d 968, 974–75 (9th Cir. 2004) (habeas petitioner could not rely on state collateral-review counsel's errors to overcome procedural default when the petitioner did

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[3] In his statement of the case, Petitioner cites the opinion below and asserts that his counsel "failed effectively to inform [him] that he needed to file his own petition, and he did not do so." (Petition, at 4–5, citing *Martinez*, 623 F.3d at 734.) The Court of Appeals, however, merely indicated that Petitioner had made this *allegation*. *Martinez*, 623 F.3d at 734. More importantly, Petitioner does not assert this as a ground for overcoming his procedural default; instead, he seeks to establish a general constitutional right to the effective assistance of collateral-review counsel in raising ineffective-assistance-of-trial-counsel claims. (Petition, at 8–21.) Thus, any contention that Petitioner's default should be excused because he was not adequately informed of his right to file his own *pro per* petition is not before this Court. *See* Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court").

not preserve the substantive claims by presenting them *pro se* to the state court). *Cf. Lawrence*, 549 U.S. at 337 (concluding that attorney error in postconviction proceeding could not be the basis for equitable tolling, *inter alia*, because the prisoner could have represented himself).

CONCLUSION

Adopting Petitioner's position that he is entitled to effective assistance of counsel during his first state collateral-review proceeding would effectively require a second collateral-review proceeding to assess the effectiveness of counsel who handled the first proceeding; this, in turn, would defeat the States' interests in the finality of their criminal convictions and would improperly shift the focus of criminal proceedings away from the "main event"—the trial.

Accordingly, and for the above reasons, the State respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted

THOMAS C. HORNE
Attorney General

DAVID R. COLE
Solicitor General

KENT E. CATTANI
Division Chief
Criminal Appeals/
Capital Litigation Division

MICHAEL T. O'TOOLE
Assistant Attorney General
(Attorney of Record)
Criminal Appeals/
Capital Litigation Division
1275 W. Washington
Phoenix, Arizona 85007–2997
Telephone: (602) 542–4686

1675835

APPENDIX A

Robert Bartels
State Bar No. 330005
College of Law
Arizona State University
Tempe, AZ 85287-7906
Tel.: 480-965-7053
Counsel for Defendant

RECEIVED
DATE FEB 07 2005
Kristi Youtsey Ruiz
Clerk Superior Court
By_s/_____

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF PINAL

STATE OF ARIZONA, Plaintiff,	No. CR99026111.
v.	PETITION FOR POST-CONVICTION RELIEF
LUIS MARIANO MARTINEZ, Defendant.	(The Hon. Gilberto V. Figueroa)

Instructions: In order for this petition to receive consideration by the court, each applicable question must be answered fully but concisely in legible handwriting or by typing. When necessary, an answer to a particular question may be completed on the reverse side of the page or on an additional blank page, making clear to which question such continued answer refers.

Any false statement of fact made and sworn to under oath in this petition could serve as the basis for prosecution and conviction for perjury. Therefore, exercise care to assure that all answers are true and correct.

A person unable to pay costs of this proceeding and to obtain services of counsel without incurring substantial hardship to himself or his family should complete the Defendant's Financial Statement and Request for Appointed Counsel attached to this petition.

NO ISSUE WHICH HAS ALREADY BEEN RAISED AND DECIDED ON APPEAL OR IN A PREVIOUS PETITION MAY BE USED AS A BASIS FOR THIS PETITION.

TAKE CARE TO INCLUDE EVERY GROUND FOR RELIEF WHICH IS KNOWN AND WHICH HAS NOT BEEN RAISED AND DECIDED PREVIOUSLY, SINCE FAILURE TO RAISE ANY SUCH GROUND IN THIS PETITION WILL BAR ITS BEING RAISED LATER.

When the petition is complete, mail it to the clerk of the superior court of the county in which conviction occurred.

Because of my poverty I am financially unable to pay for the cost of a lawyer to represent me without incurring substantial hardship to myself or my family.

_____

Defendant

Subscribed and sworn to before me on _____

_____

1. Petitioner's Name: Luis Mariano Martinez\

Petitioner's prison number (if any): 165798.

2. Petitioner is now: (A) [ ] On Parole
(B) [ ] On Probation
(C) [X] Confined in Arizona State Prison, Rynning Unit, Florence, AZ 85232.

3. (A) Petitioner was convicted of the following crimes:

Two counts of sexual conduct with a minor under the age of fifteen.

(B) Petitioner was sentenced on February 19, 2002, to a term of 35 years to life on each count commencing on August 31, 2001, following a

[X] Trial by Jury

[ ] Trial by a Judge without a Jury

[ ] Plea of Guilty

[ ] Plea of No Contest

in the Superior Court for Pinal County with Judge Gilberto V. Figueroa presiding.

(C) The file number of the case was CR99026111.

4. Petitioner is eligible for relief because of:

[ ] The introduction at trial of evidence obtained pursuant to an unlawful arrest.

[ ] The introduction at trial of evidence obtained by an unconstitutional search and seizure.

[ ] The introduction at trial of an identification obtained in violation of constitutional rights.

[ ] The introduction at trial of a coerced confession.

[ ] The introduction at trial of a statement obtained in the absence of a lawyer at a time when representation is constitutionally required.

[ ] Any other infringement of the right against self-incrimination.

[X] The denial of a constitutional right to representation by a competent lawyer at every critical state of the proceeding.

[ ] The unconstitutional suppression of evidence by the state.

[ ] The unconstitutional use by the state of perjured testimony.

[ ] An unlawfully induced plea of guilty or no contest.

[ ] Violation of the right not to be placed twice in jeopardy for the same offense.

[ ] The abridgement of any other right guaranteed by the constitution or the laws of this state, or the constitution of the United States, including a right that was not recognized as existing at the time of

the trial if retrospective application of that right is required.

[ ] The existence of newly-discovered material which require the court to vacate the conviction or sentence. [Specify when petitioner learned of these facts for the first time, and show how they would have affected the trial.]

[ ] The lack of jurisdiction of the court which entered the conviction or sentence.

[ ] The use by the state in determining sentence of a prior conviction obtained in violation of the United States or Arizona constitutions.

[ ] Sentence imposed other than in accordance with the sentencing procedures established by rule and statute.

[ ] Being held beyond the term of sentence or after parole or probation has been unlawfully revoked.

[ ] The failure of the judge at sentencing to advise petitioner of his right to appeal and the procedures for doing so.

[ ] The failure of petitioner's attorney to file a timely notice of appeal after being instructed to do so.

[ ] The obstruction by state officials of the right to appeal.

[X] Any other ground within the scope of Rule 32 of the Arizona Rules of criminal Procedure (please specify).

5. The facts in support of the alleged error(s) upon which this petition is based are contained in Attachment A. [State facts clearly and fully; citations or discussions of authorities need not be included].

6. Supporting Exhibits:

(A) The following exhibits are attached in support of the petition:

[X] Affidavits	[Exhibit (s) # 2]
[X] Records	[Exhibit (s) # 1]
[X} Other supporting evidence	[Exhibit (s) # 3]

(B) No affidavits, records, or other supporting evidence attached because

_____

_____

_____ .

7. Petitioner has taken the following actions to secure relief from his convictions or sentences:

(A) Direct Appeal: [X] Yes [ ] No (If yes, name the courts in which appeals were taken, date, number, and result.) Arizona Court of Appeals: No. 2-CA-CR-2002-0088, affirmed March 22, 2004; Arizona Supreme court: No. CR04-0158-

PR, Petition for Review denied September 21, 2004.

(B) Previous Rule 32 Proceedings: [X] Yes [ ] No (If yes, name the court in which such petitions were filed, dates, numbers, and results, including all appeals from decisions on such petitions.)
Pinal County Superior No. CR99026111; Notice filed May 28,2002; Notice of "no colorable claims" filed February 14, 2003, by appointed counsel; dismissed April 28, 2003; see Attachment A.

(C) Previous Habeas Corpus or Special Action Proceedings in the Courts of Arizona: [ ] Yes [X] No (If yes, name the court in which such petitions were filed, dates, numbers, and results, including all appeals from decisions on such petitions.

_____

_____

(D) Habeas Corpus or Other Petitions in Federal Courts: [ ] Yes [X] No (If yes, name the court in which petitions were filed, dates, court numbers civil action or miscellaneous, and results, including all appeals from decisions on such petitions.)

_____

_____

8. Petitioner was represented by the following lawyers at (place name of counsel in the blanks and their address if known):

Arraignment and plea: Robert White, Pinal Public Defender, 400 S. Central Ave., P.O. Box 2457, Florence, AZ 85232-2457.

Trial: Same.

Sentencing hearing: Same.

Appeal (if any): Harriette Levitt, 485 S. Main Ave., Tucson, AZ 85701-2227

Preparation, presentation, or consideration of any previous petitions or motions for post-conviction relief filed in connection with this conviction. Harriette Levitt (address above)

9. The issues which are raised in this petition have not been finally decided nor raised before because: (State facts.) The ineffective-assistance-of-counsel issues were not raised previously because of ineffective assistance of appellate and post-conviction counsel. In addition, the issues raised in this petition are of "sufficient constitutional magnitude" that they are not subject to preclusion under Rule 32.2. (See Attachment A).

10. Because of the foregoing reasons, the relief which the petitioner desires is:

(A) [ ] Release from custody and discharge.
(B) [X] A new trial.
(C) [ ] Correction of sentence.

(D) [ ] The right to file a delayed appeal.
(E) [ ] Other relief (specify):

_____

_____

11. Petitioner is presently represented by counsel.

[X] Yes [ ] No. If yes, his name and address.
Robert Bartels. College of Law. Arizona State University, Tempe, AZ 85287-79006

If no, does the petitioner request the court to appoint counsel to represent him in this proceeding?

[ ] Yes [X] No

I swear or affirm that this petition includes all the claims and grounds for post-conviction relief that are known to me, that I understand that no further petitions concerning this conviction may be filed on any ground of which I am aware but do not raise at this time, and that the information contained in this form and in any attachments is true to the best of my knowledge or belief.

s/_____
Counsel for Petitioner

ATTACHMENT A

(Petition for Post-Conviction Relief;
State v. Martinez, No. CR99026111)

STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES

I. BASIC FACTS

A. Procedural History

Defendant was charged with two counts of sexual conduct with Lacey Lyness ("Lacey"), a person under the age of fifteen, allegedly committed on July 10, 1999. Defendant was convicted on both counts. On February 19, 2002, Defendant was sentenced to consecutive terms of 35 years to life, pursuant to A.R.S. § 13-604.01. (R. 629-32). Defendant's direct appeal raised prosecutorial misconduct and newly-discovered-evidence issues. The Court of Appeals affirmed on March 22, 2004, and the Arizona Supreme Court denied review on September 21, 2004 (accompanying EX. 1[1]).

On May 28, 2002, during the pendency of Defendant's direct appeal, Defendant's court-appointed appellate counsel, Harriette Levitt, filed a Notice of Post-Conviction Relief. On February 14, 2003, Ms. Levitt filed a "Notice Pursuant to Rule 32.4(c), Arizona

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[1] The PCR exhibits referred to in this Memorandum are being filed separately.

Rules of Criminal Procedure." That Notice informed the Court that she had "reviewed the transcripts and trial file and [could] find no colorable claims pursuant to Rule 32, Arizona Rules of Criminal procedure" and requested that the Court issue an order granting Defendant 45 days to file a pro se Petition for Post-Conviction Relief. As section III(A), infra, will show in more detail, Ms. Levitt failed effectively to inform Defendant that he needed to file his own supplemental petition for post-conviction relief, and he did not do so. On April 28, 2003, this Court dismissed the pending Notice of Post-Conviction Relief.

B. Outline of Evidence at Trial

The following paragraphs will outline the evidence presented at Defendant's trial. Additional facts relating to Defendants' claims for relief will be discussed in connection with those claims.

The State's theory was that Defendant had sexual intercourse with his stepdaughter, Lacey Lyness, on two occasions during the morning of July 10, 1999, the first time in her bedroom and the second time after he had pushed her onto the floor of the kitchen. (TT 8/22/01 19, 192-93). Lacey was the first witness called by the State. Although she testified at some length, she claimed not to remember much of what had (or had not) happened on July 10, 1999 and for the weeks that followed, responding "I don't remember" or "I'm not sure" 149 times during her testimony on direct examination alone. (TT 8/23/01 5-73, 79-96). For example, Lacey testified that she was "not sure" whether she told her mother, Kim Martinez,

that Defendant had sexual intercourse with her (TT 8/23/01 31, 34), that she could not remember whether she made several statements to a police officer, Brenda White, about Defendant's conduct on July 10, 1999 (TT 8/23/01 36-40), and that she did not remember "anything at all about [Defendant] that morning" (TT 8/23/01 29). On cross examination, however, Lacey testified that Defendant did not try to have sex with her or to "put his penis up against" her. (TT 8/2/301 152).

Although Lacey's testimony at trial did not inculpate Defendant, the State .was permitted to offer testimony that Lacey had made statements prior to trial indicating that Defendant had rubbed her "private area" and twice had put his "private area" inside her "private area." Lacey made those statements to her mother and then to Officer White on July 10, and to a social worker, Wendy Dutton, on July 15. (T. 8/29/01 125-26; T. 8/24/01 4-12, 21-22, 26, 41, 68-69, 73-75). On the other hand, there was evidence that Lacey had recanted her accusations against Defendant during later pretrial conversations with her grandmother (Yvonne Lyness), her mother, Detective Means, and Ms. Dutton. (T. 8/24/01 25-26, 128-32; T. 8/29/01 165-66; T. 8/30/01 10-15). Lacey's recantations were consistent with Defendant's exculpatory statements to the police. (TT 8/30/01 74-82, T. 8/24/01 130-32).

The prosecution sought to explain Lacey's recantations in large part by arguing that they were the result of her mother's having chosen Defendant over Lacey and having "isolated Lacey from her family,

from her friends, from her schoolmates, [and] from her friends . . . by saying she's lying, . . . I don't believe her." (TT 8/31/01 36, 42-43, 106). In this regard, the prosecution relied heavily on the expert testimony of Ms. Dutton that a "range of research" in the area of recantation indicated that it's not at all uncommon for kids to take back true allegations of abuse," and that "the number one reason for a child to recant a true allegation of abuse" was an "unsupportive mother." (TT 8/31/01 30, 35 [State's closing argument]; TT 8/24/01 29-31 [testimony of Ms. Dutton]). Defense counsel, who had not read the literature on "Child Sexual Abuse Accommodation Syndrome," did not offer any expert testimony regarding recantation.

The State presented evidence that a nightgown that Lacey was wearing when the police arrived at the Martinez residence on the morning of July 10, 1999 contained semen stains that matched Defendant's DNA. (TT 8/24/01 62-63, 76-77, 89, 94-95, 124-25, 160-61; TT 8/29/01 13-23; 45-52). However, the evidence also indicated that it was not possible to determine when the semen had been deposited on the nightgown (TT 8/29/01 26, 40, 44, 54), that semen still could be found on a garment even after it had been washed (TT 8/29/01 27-28), that no testing had been done to determine whether the nightgown had been washed recently (TT 8/29/01 32), and that the extremely low sperm count in the semen samples on the nightgown could have resulted from washing (TT 8/29/01 29). Moreover, the defense presented some evidence suggesting non-inculpatory explanations for the semen stains, including testimony by Lacey that she might have gotten her nightgown from a pile of dirty laundry

(T. 8/23/01 173-76); vaginal swabs collected during a sexual assault examination on July 10 did not contain semen (TT 8/29/01 9-13); and the same examination also did not disclose any evidence of injury or trauma on Lacey's body, including her vaginal area. (TT 8/29/01 76-77; Ex. 46).

II. DEFENDANT WAS DEPRIVED OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE UNITED STATES AND ARIZONA CONSTITUTIONS

A. The Legal Framework

Defendant's central claim for post-conviction relief is that his trial attorney, Robert White, provided ineffective assistance of counsel, in violation of Defendant's rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article 2, § 24 of the Arizona Constitution. The current standards for a claim of ineffective assistance of counsel were first set out in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to establish such a claim, a defendant must show (1) "that counsel's performance was deficient," and (2) "that the deficient performance prejudiced the defense." 466 U.S. at 687. With respect to the first requirement, the defendant must show that "counsel's representation fell below an objective standard of reasonableness" – i.e., that counsel's conduct was not "within the range of competence demanded of attorneys in criminal cases." Id. at 687-88. With respect to the second requirement, the defendant must show that "there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different." Id. at 694. The defendant need not show that "counsel's deficient conduct more likely than not altered the outcome in the case"; rather, the question is "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. at 693, 695.

The Arizona Supreme Court has on several occasions applied the Strickland standards in finding that defendants did not receive effective assistance of counsel. See, e.g., State v. Vickers, 180 Ariz. 521, 885 P.2d 1086 (1994); State v. Fisher, 152 Ariz. 116, 730 P.2d 825 (1986); State v. Tapia, 151 Ariz. 62, 725 P.2d 1096 (1986); State v. Bush, 148 Ariz. 325, 714 P.2d 818 (1986).

B. In Several Respects, Defense Counsel Provided Ineffective Assistance With Regard to the Central Issue in the Case -- Whether the Victim Was Telling the Truth When She Accused Defendant of Sexual MisConduct or When She Recanted That Accusation

As section I(B) (pp, 2-5, above) has demonstrated, the central issue at trial was whether the alleged victim, Lacey Lyness, was telling the truth when she accused Defendant of sexual misconduct on July 10, 1999 -- or when she later recanted the accusation, both before and during trial. With regard to that central issue, the performance of Defendant's

trial counsel, Mr. White, was unconstitutionally deficient in several respects:

1. Defense counsel's failure (a) to object to "quantified" expert testimony regarding recantation, and (b) to develop and introduce expert testimony on recantation

In addition to discussing factors that may lead a child to recant a true allegation of abuse, the State's expert on recantation, Ms. Dutton, testified that a "range of research" suggested that recantation of true statements of abuse was "not uncommon," and that "[o]verwhelmingly the research suggests that lack of the support from the mother of the victim is the most common prompt for recantation." (TT 8/24/01 29-30).[2] With regard to this testimony, defense counsel's performance was deficient in two respects:

a. Defense counsel did not object to Ms. Dutton's above-described testimony, even though it was inadmissible under State v. Lindsey, 149 Ariz. 472, 720 P. 2d 73 (1986). In Lindsey, a prosecution for incest and sexual exploitation of a minor, an expert witness for the State testified .that "most people in the field feel that it's a very small proportion [of incest victims] that lie." Id. at 473-74, 720 P.2d at 74-75. The Arizona Supreme Court held that the admission of this

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[2] In closing argument, the prosecution characterized this testimony as stating that "it's not at all uncommon for kids to take back true allegations of abuse," and that "the number one reason for a child to recant a true allegation is . . . [a]n unsupportive mother." (TT 8/31/01 30, 35; emphasis added).

testimony was reversible error, because it went beyond providing information on "the behavioral characteristics of victims of child molesting" and effectively "quantifie[d] the probabilities of the credibility of another witness." Id. at 473-74, 475, 720 P.2d at 474-75, 476. Similarly, Ms .Dutton's testimony in this case effectively quantified the frequency of recantation of false allegations of abuse and the impact of an unsupportive mother on recantation. By failing to object to Ms. Dutton's testimony even though it was inadmissible under Lindsey, defense counsel provided ineffective assistance of counsel. State v. Vickers, 180 Ariz. 521, 525-527, 885 P.2d 1086, 1090-1092 (1994).

b. Although defense counsel was familiar with Ms. Dutton and knew that she would testify for the State, defense counsel did not research the literature on recantation or consult with an expert on that subject prior to trial.[3] Thus, his cross examination of Ms. Dutton did little to address the points quoted above except to elicit testimony that "[t]he research doesn't specifically address when children take back or admit to a false allegation." (TT 8/24/01 31). Moreover, the defense had no expert testimony to counter Ms. Dutton's testimony. That such testimony would have been available is demonstrated by the accompanying Exhibit 2, which is the affidavit of Phillip W. Esplin, Ed.D, an experienced and highly qualified expert on child sexual abuse. In Dr. Esplin's opinion, Ms.

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[3] The representations in this Memorandum regarding defense counsel are based on the undersigned's interviews with Mr. White. Defendant intends to call Mr. White as a witness at the hearing on this Petition.

Dutton's "verbal quantification regarding the frequency of false recantation . . . [and] the frequency of motivational influences on a child that trigger a false recantation" are inaccurate and misleading in light of the empirical literature in the field. (Ex. 2 at 3).

Arizona case law makes it clear that inadequate pre-trial preparation may amount to ineffective assistance of counsel. See State v. Vickers, State v. Fisher, and State v. Bush, supra. Given the nature of this case and the fact that defense counsel knew that the State would call Ms. Dutton as an expert witness, it was ineffective not to develop and offer expert testimony for the defense. And given the importance of the recantation issue and Dr. Esplin's affidavit, defense counsel's failure was prejudicial to the defense.

2. Defense counsel's failure to impeach an important recantation witness, Detective Means, with his report on his interview with the alleged victim

Eloy Police Officer Garrett Means testified that the alleged victim had told him during a pre-trial interview that Defendant did not actually have sex with her "but he had tried to." (TT 8/24/01 134-35). In closing argument, the prosecution used this testimony to argue (a) that Lacey's recantation was "inconsistent and [made] no sense," and (b) that Lacey's statements to Detective Means, even if taken a face value, indicated that Defendant was "guilty of attempted sexual conduct with a minor." (TT 8/31/01 52-53). With regard to Detective Means' above-described testimony,

defense counsel was ineffective in failing to impeach Detective Means with two portions of his report on his interview with Lacey:

a. Detective Means' report (Trial Exhibit 45, accompanying Exhibit 3[4]) contained the following passage:

> I confirmed with Lacey that she did tell her mother that Luis had sex with her. She told me "He didn't actually have sex with me." I asked her what he actually did. She told me she said that he had tried too [sic].

(Accompanying Ex. 3, p. 2; emphasis added). While this passage is not a model of clarity, the fact that it begins with a reference to what Lacey told her mother and concludes with the statement that Lacey "told me she said that he had tried to" certainly suggests that the last sentence only means that Lacey told her mother (rather than Detective Means) that Defendant had "tried to." Thus, the above-quoted portion of Detective Means' report would have helped to counter the prosecution's argument that Lacey's recantation to Detective Means was only partial -- if defense counsel had made the jury aware of that portion.

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[4] From the trial transcripts, it appears that while Detective Means used Trial Exhibit 45 to refresh his recollection, it was not introduced into evidence (probably because it would have been inadmissible hearsay if offered by the State).

b. The next-to-last paragraph of Detective Means' report (accompanying Ex. 3, p. 3) stated as follows:

> I asked Lacey if anything else happened on the morning of 7-10-99 other than Luis getting mad at her for not cleaning the house. Lacey shook her head to say no. I asked Lacey if Luis spanked her or do [sic] anything else. She shook her head to say no. I confirmed with [Lacey) that Luis only got mad and left. She nodded her head to say yes.

Obviously, this paragraph indicated that Lacey told Detective Means that Luis did not do anything on the morning in question except get mad and leave, and it therefore would have further countered Detective Means' testimony that Lacey indicated that Defendant had tried to have sex with Lacey.[5]

3. Defense counsel's failure to introduce evidence of additional recantations by the victim

Besides the expert testimony of Ms. Dutton, the prosecution had specific arguments for not crediting each of the recantations by the alleged victim with regard to which evidence was introduced at trial. For

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[5] Although trial Exhibit 45 was inadmissible hearsay if offered by the State, it would have been admissible if offered by the defense, both to impeach the witness under Ariz. R. Evid. 801(d)(1)(A) and as an admission by an agent of the State under Ariz. R. Evid. 80(d)(2)(C) and (D).

example, the prosecution cast doubt on whether Lacey in fact had recanted to her mother by pointing out that Mrs. Martinez did not report the recantation to the police for several days after she claimed Lacey had made it, that she did not mention it to her mother (with whom Lacey was staying), and that Lacey herself testified that she did not remember telling her mother that she had lied. (TT 8/31/01). The prosecution also cast doubt on Lacey's recantations to her grandmother (Yvonne Lyness), Detective Means, and Ms. Dutton by pointing out that Lacey was unable to describe anything about the television program that she claimed had inspired her to falsely accuse Defendant in the first place; and the prosecution asserted that Lacey's recantation to Detective Means was only partial. (TT 8/31/01). Moreover, the prosecution discredited Lacey's recantation at trial by asking the jury to compare her reticence and evasiveness on the witness stand to her demeanor when she initially accused Defendant in pretrial conversations with her mother, Officer White; and Ms. Dutton. (TT 8/31/01).

Nevertheless, defense counsel failed to introduce into evidence the videotape of his pretrial interview with Lacey,[6] during which she was more cheerful and open than at trial, and during which she stated that Defendant had never tried to have sex with her.[7] Defense counsel did so even though he was surprised

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[6] Undersigned counsel has a copy of the videotape and is prepared to introduce it at the hearing on this Petition.

[7] At the pretrial interview, Lacey also recalled getting the nightgown that she was wearing on July 10, 1999 from a pile of dirty clothes the day before. (See section II(C) below).

by Lacey's reticence at trial, and even though he believed that the pretrial interview was much more favorable to Defendant.[8]

Defense counsel also failed to interview, and therefore did not present the testimony of, a friend of the Martinez family, Linda Flores. Ms. Flores would have testified that Lacey told her that the alleged incident with Defendant did not happen, that Lacey did not like Defendant and wanted him to leave, and that Lacey was not upset when she spoke to Ms. Flores.[9]

Defense counsel had no tactical or strategic reason for not introducing either the videotape of his pretrial interview with Lacey or the testimony of Ms. Flores. Moreover, both the videotape and Ms. Flores' testimony would have been admissible: Because the prosecution had introduced several out-of-court statements by Lacey that inculpated Defendant to prove the truth of the matters asserted therein, defense counsel could have offered the videotape and Ms. Flores' testimony to impeach Lacey, State v. Owen, 101 Ariz. 156, 158, 416 P.2d 589, 591 (1986), cert. denied 388 U.S. 915 (1967); and under Chambers v. Mississippi, 410 U.S. 284 (1973), exclusion of the videotape and Ms. Flores' testimony would have violated Defendant's constitutional rights to confront a witness against him (Lacey) and to present evidence in

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[8] See footnote 3, above.

[9] The representations regarding Ms. Flores in the text, above are based on the undersigned's interview with her. Defendant intends to call Ms. Flores as a witness at the hearing on this Petition.

his defense. Consequently, defense counsel's failure to introduce the videotape, and to discover and introduce Ms. Flores' testimony, was not within the range of competence demanded of attorneys in criminal cases.

4. Cumulative impact of defense counsel's errors concerning the recantation issue

Individually, each of the deficiencies in defense counsel's performance discussed above amounted to ineffective assistance of counsel. Even more clearly, the cumulative prejudicial impact of those deficiencies requires reversal of Defendant's convictions. See Harris v. Wood, 64 F.3d 1432 (9th Cir. 1995) (cumulative impact of multiple errors by counsel); State v. Bush, 148 Ariz. 325, 327-28, 714 P.2d 818, 820-21 (1986) (ineffectiveness resulting from "mishandling of crucial testimony as to whether the victim was shot in the front or the back").

c. Defense Counsel Provided Ineffective Assistance of Counsel by Failing to Discover and Introduce Testimony That Was Highly Relevant to the State's DNA Evidence

As noted in section I(B) of this Memorandum (p. 4, above), the prosecution introduced evidence that semen recovered from a nightgown that Lacey was wearing on the morning of July 10, 1999 matched Defendant's DNA. While the defense presented some evidence that suggested possible exculpatory explanations for the DNA evidence (see pp. 4-5, above), those possibilities were somewhat speculative, and the jury apparently did not believe that they were

sufficient to create a reasonable doubt. However, if defense counsel had provided effective representation prior to and during trial, he would have uncovered and presented additional, and less speculative, evidence of an exculpatory explanation for the DNA evidence:

1. At trial, Lacey testified that she sometimes got clothes from the floor in a location where dirty clothes were kept, but that she did not know whether or not she had gotten the nightgown she was wearing on the morning of July 10, 1999 from that location. (TT 8/23/01 174-75). During her pretrial interview with defense counsel, however, she stated that she did recall getting the nightgown from the dirty clothes pile on July 9. Thus, defense counsel's failure to introduce the videotape of his pretrial interview with Lacey left a point that was important to the probative value of the State's DNA evidence more uncertain than it needed to be.

2. Prior to trial, defense counsel interviewed Defendant about whether he had masturbated prior to the time of the alleged offense. However, defense counsel conducted this interview with Defendant's wife present, even though he knew or should have known that this would make it extremely difficult for Defendant to admit to having masturbated.[10] Consequently, defense counsel failed to develop (or offer) testimony by Defendant that he in fact had masturbated onto a nightgown from the household's dirty clothes pile prior to July 10, 1999.

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[10] See footnote 3, above.

D. Defense Counsel Provided Ineffective Assistance of Counsel by Failing to Interview Several Witnesses Who Would Have Provided Testimony Favorable to Defendant

Prior to trial, defense counsel failed to interview several readily available witnesses who would have provided evidence favorable to Defendant, including the following:[11]

1. Linda Flores would have testified that the Martinez family had an adult male neighbor who ran around naked, and that Lacey had seen him do so. This testimony would have been favorable to the defense because Lacey testified that she had not seen an adult penis prior to July 10, 1999 (TT 8/23/01 38), and the prosecution argued at trial that a drawing of a penis that Lacey produced during her first interview with Ms. Dutton must have been based on her seeing Defendant's penis. (TT 8/31/01 21). Ms. Flores, who had known Defendant for about 5 years at the time of trial, also would have provided testimony that it was "not in Luis' nature" to commit the offenses with which he was charged. (See also section II(B) (3), pp. 13-14 above.)

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[11] The representations in the following paragraphs of the text are based on the undersigned's interviews with defense counsel and the witnesses named below, and on material from defense counsel's file.

2. Patty Ollerton de Arguelles and her husband allowed Defendant to live in their home after he was charged in this case, and she had permitted Defendant to take care of her own children (a 16 year-old daughter, a 14 year-old boy, and an infant). Ms. Ollerton would have provided favorable testimony regarding Defendant's character.

3. LuAnn Amos White would have testified that she spoke to Lacey by telephone a few minutes before Lacey called her mother on July 10, 1999 to accuse Defendant of sexual misconduct; that Lacey did not sound upset; and that Lacey said that she was angry with Defendant because he would not let her read her book.

There was no tactical or strategic reason for defense counsel not to interview the witnesses described above, and defense counsel's failure to interview them was ineffective. See State v. Bush, supra.

D. The Total Cumulative Prejudicial Effect of Defense Counsel's Errors

In sum, the errors by defense counsel discussed above adversely affected every issue of importance to the defense. Consequently, even if one assumed (incorrectly) that none of those errors by itself was sufficiently prejudicial to amount to constitutionally ineffective assistance of counsel, their cumulative impact would create more than a reasonable probability that the result of the proceeding would

have been different in their absence. Harris v. Wood, 64 F.3d 1432 (9th Cir. 1995).

III. DEFENDANT'S CLAIMS ARE NOT PRECLUDED

Notwithstanding the Notice of Post-Conviction Relief that was filed in this case on May 28, 2002 and dismissed on April 28, 2003 (see section I(A), pp. 1-2), Defendant's claims for post-conviction relief are not precluded under Ariz. R. Crim. P. 32.2. Rule 32.2(a) provides that a defendant is precluded from relief under Rule 32 based on any ground:

> (1) Raisable on direct appeal under Rule 31 or on post-trial motion under Rule 24;
>
> (2) Finally adjudicated on the merits on appeal or in any previous collateral proceeding;
>
> (3) That has been waived at trial, on appeal, or in any previous collateral proceeding.

It is obvious that neither Rule 32.2(a) (1) nor Rule 32.2(a) (2) applies in this case.[12] And Rule 32.2(a) (3) also does not apply, for the reasons that follow.

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[12] (1) Defendant no longer can raise any of his claims on direct appeal or by post-trial motion; and (2) none of the claims in this Petition has been finally adjudicated on the on appeal or in any other previous proceeding.

A. Defendant Received Ineffective Assistance of Counsel With Regard to the First Notice of Post-Conviction Relief

Most claims of "trial error" are precluded under Rule 32.2(a) if the defendant did not raise them "at trial, on appeal, or in a previous collateral proceeding." 2002 Comment to Rule 32.2; Stewart v. Smith, 202 Ariz. 446, 46 P.3d 1067 (2002). However, if the failure to raise a claim at trial, on appeal, or in a previous collateral proceeding is the result of ineffective assistance of counsel, the claim is not precluded. State v. Jackson, 209 Ariz. 13, 14-15, 97 P.3d 113, 114-15 (App. 2004); State v. Pruett, 185 Ariz. 128, 130-31, 912 P.2d 1357, 1359-60 (App. 1995); State v. Herrera, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App.1995). In Pruett, the defendant pleaded guilty and no contest to attempted child molestation, attempted sexual conduct with a minor, and attempted sexual abuse. He then filed an initial petition for post-conviction relief -- and then a second petition for post-conviction relief raising for the first time a claim that his previous Rule 32 counsel was ineffective. The Court of Appeals held that the defendant had a constitutional right to effective assistance of counsel with regard to his first Rule 32 petition, because Rule 32 was the only means available for a pleading defendant to exercise his "constitutional right to appellate review," and that the defendant's second Rule 32 petition therefore was not precluded. 185 Ariz. at 130-131, 912 P.2d at 1359-60.

As in Pruett, the only avenue available to Defendant for raising the ineffective-assistance-of-counsel claims presented in this Petition was a Rule 32

petition. State.v. Spreitz, 39 P.3d 525, 527 (2002); State v. Jones, 185 Ariz. 471, 482, 917 P.2d 200, 211 (1996). Consequently, Defendant was entitled to effective. assistance of counsel with regard to the first Rule 32 counsel (Harriette Levitt):

> 1. The fact that previous Rule 32 counsel did not uncover or raise the ineffective-assistance-of-trial-counsel claims discussed in section II of this Memorandum by itself shows that she was ineffective.
>
> 2. Ms. Levitt's failure to raise the claims discussed' in section II, above may be. attributable in part to the fact that she never contacted trial counsel[13] and apparently did nothing besides reviewing "the transcripts and trial file" before notifying this Court that she could "find no colorable claims pursuant to Rule 32, Arizona Rules of Criminal Procedure." (Notice Pursuant to Rule 32.4(c), filed Feb. 14, 2003). Obviously, Rule 32 counsel cannot competently evaluate the possibility of ineffectiveness of trial counsel by simply reviewing the transcripts and trial file.
>
> 3. Previous Rule 32 counsel also was ineffective in her communications with Defendant. On February 12, 2003, Ms. Levitt sent a letter to Defendant stating that she had not been able to find any arguable issues under

[13] See footnote 3, above.

> Rule 32, and that Defendant had 30 days in which to file a "supplemental pro se petition." On February 25, 2003, Ms. Levitt sent Defendant another letter, this time with the Court's order setting the deadline for the filing of a supplemental pro se petition for post-conviction relief. On May 16, 2003, after this Court had dismissed the first Rule 32 Notice, Ms. Levitt sent a letter to Defendant informing him that he could file a petition for review by the Court of Appeals on or before June 12, 2003 if he wished to do so, and enclosing his transcripts and "trial file." However, all of these letters and other documents were written in English – even though Defendant Mr. Martinez wrote to Ms. Levitt on March 3, 2003, in Spanish, and informed her that he did not read English and did not "understand anything of what is happening." Defendant was not able to file a supplemental pro se petition for post-conviction relief, or a petition for review by the Court of Appeals, because he could not read or write in English, and because he had no legal knowledge or access to legal materials.

In short, Defendant's valid claim of ineffectiveness of his previous Rule 32 counsel prevents the preclusion of his claims of ineffectiveness of trial counsel.

B. Defendant's Ineffective-Assistance-of-Trial-Counsel Claims Are Not Precluded Because They Are "Of Sufficient Constitutional Magnitude."

Even if Defendant had not received ineffective assistance of counsel with regard to his previous Rule 32 Notice, the ineffective-assistance-of-trial-counsel claims raised by this Petition would not be precluded:

1. If a post-conviction claim is "of sufficient constitutional magnitude" -- i.e., if the claim involves a right that is necessary to a fair trial, personal to the defendant, and waivable only by the defendant himself -- then the State must prove that the defendant "knowingly, voluntarily, and intelligently" waived the claim in order for it to be precluded under Rule 32.2(a)(3). Stewart .v. Smith, 202 Ariz. 446, 449-50, 46 P.3d 1067, 1070-71 (2002); see also 2002 Comment to Rule 32.2. More specifically:

> [I]f a petitioner asserts ineffective assistance of counsel for the first time in a successive Rule 32 petition, the question of preclusion is determined by the nature of the right allegedly affected by counsel's ineffective performance. If that right is of sufficient constitutional magnitude to require personal waiver by the defendant and there has been no personal waiver, the claim is not precluded.

Stewart v Smith, supra, 202 Ariz. at 450, 46 P.3d at 1071.

2. All of the instances of ineffectiveness of trial counsel discussed in section II, above affected either Defendant's constitutional right to confront the witnesses against him or his constitutional right to present evidence in his defense -- or both. Under Chambers v. Mississippi, 410 U.S. 284 (1973), both of these rights are sufficiently fundamental and necessary to a fair trial to be applicable to the States under the Due Process Clause of the Fourteenth Amendment; and both obviously require personal waiver by the defendant. But there is no evidence that Defendant knowingly, voluntarily, and intelligently waived these rights. Under Stewart v. Smith, supra, Defendant's ineffective-assistance-of-trial-counsel claims therefore are not precluded.

IV. CONCLUSION

For the reasons stated above, the Court should hold a hearing on Defendant's Petition for Post-Conviction Relief and then grant the Petition.

RESPECTFULLY SUBMITTED this 7th day of February, 2005.

/s/_____
Robert Bartels
Counsel for Defendant

Copy of the foregoing
mailed this 7th day of
February, 2005, to:

Sylvia Lafferty
Deputy County Attorney
P.O. Box 887
Florence, AZ 85232
Counsel for State of Arizona

The Hon. Terry Goddard
Attorney General of Arizona
1275 West Washington
Phoenix, AZ 85007

By: /s/
Robert Bartels

APPENDIX B

Robert Bartels
State Bar No. 330005
College of Law
Arizona State University
Tempe, AZ 85287-7906
Tel.: 480-965-7053
FAX: 480-965-2427

FILED
ARIZONA COURT OF
APPEALS DIV. TWO

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JEFFREY P. HANDLER
CLERK

**IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO**

STATE OF ARIZONA,	)
	) Court of Appeals No.
Plaintiff/Respondent,	) 2 CA-CR 06-0001-PR
	)
v.	) Pinal County Superior
	) Court No. CR99026111
LUIS MARIANO MARTINEZ,	)
	)
	)
Defendant/Petitioner.	)
	)

PETITION FOR REVIEW

I. ISSUES PRESENTED FOR REVIEW

1. Whether Defendant's trial counsel provided ineffective assistance by failing (a) to object to improper expert testimony regarding the alleged victim's recantation of her out-of-court accusations, (b) to develop and present expert testimony on recantation, (c) to impeach a critical recantation witness with his own report, and (d) to discover and present available exculpatory evidence.

2. Whether the trial court erred in finding, without explanation, that Defendant's ineffective-assistance-of-trial counsel claims were precluded, even though (a) Defendant's prior post-conviction counsel was ineffective, and (b) the rights affected by trial counsel's ineffectiveness were of "sufficient constitutional magnitude."

II. STATEMENT OF FACTS

A. Procedural History[1]

Defendant was charged with two counts of sexual conduct with Lacey Lyness ("Lacey"), a person under the age of fifteen, allegedly committed on July 10, 1999. Defendant was convicted on both counts, and on February 19, 2002 he was sentenced to consecutive terms of 35 years to life. This Court affirmed on March 22, 2004, and the Arizona Supreme Court denied review on September 21, 2004.

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[1] The procedural facts, which are not in dispute, are reflected in the documents that are referenced in the text below.

On May 28, 2002, during the pendency of Defendant's direct appeal, his court-appointed appellate counsel, Harriette Levitt, filed a Notice of Post-Conviction Relief. On February 14, 2003, Ms. Levitt filed a Notice informing the trial court that she had "reviewed the transcripts and trial file and [could] find no colorable claims pursuant to Rule 32" and requesting that the court issue an order granting Defendant 45 days to file a pro se Rule 32 Petition. As section III (B) , infra, will show, Ms. Levitt failed effectively to inform Defendant that he needed to file his own petition, and he did not do so. On April 28, 2003, the Superior Court dismissed the pending Rule 32 Notice.

Defendant filed a Notice of Post-Conviction Relief on October 18, 2004, and a timely Petition on February 7, 2005. The petition alleged that Defendant's trial counsel was ineffective in several respects. (Appendix [App.] at 11-23). The trial court dismissed the Petition on November 4, 2005, finding that Defendant's claims were precluded and without merit.[2] (Attachment [Att.] A at 2-4). The trial court denied Defendant's Motion for Rehearing on December 1, 2005. (Attachment B).

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[2] The trial court's Ruling of November 4, 2005 also found that the Notice of Post-Conviction Relief was untimely, based on its impression that the Notice was not filed until October 27, 2004. However, Defendant established that the Notice in fact was properly submitted to the Clerk on October 18, 2004, and the trial court withdrew its finding of untimeliness on December 1, 2005. (Att. B at 1).

B. Outline of Evidence at Trial

The following paragraphs will outline the evidence presented at trial. Additional facts relating to Defendants' claims for relief will be discussed in connection with those claims.

The State's theory was that Defendant had sexual intercourse with his stepdaughter, Lacey Lyness, on two occasions during the morning of July 10, 1999, the first time in her bedroom and the second time in the kitchen. (TT 8/22/01 192-93). Lacey was the first witness called by the State. Although she testified at some length, she claimed not to remember much of what had (or had not) happened on July 10, 1999 and for the weeks that followed, responding "I don't remember" or "I'm not sure" 149 times during direct examination alone. (TT 8/23/01 5-73, 79-96). On cross examination, however, Lacey testified that Defendant did not try to have sex with her or to "put his penis up against" her. (TT 8/2/301 152).

Although Lacey's testimony did not inculpate Defendant, the State was permitted to offer testimony that Lacey had made statements prior to trial -- to her mother, to Officer White, and to a social worker, Wendy Dutton -- indicating that Defendant had rubbed her "private area" and twice had put his "private area" inside her "private area." (T. 8/29/01 125-26; T. 8/24/01 4-12, 21-22, 26, 41, 68-69, 73-75). On the other hand, there was evidence that Lacey had recanted her accusations against Defendant during later pretrial conversations with her grandmother, her mother,

Detective Means, and Ms. Dutton. (T. 8/24/01 25-26, 128-32; T. 8/29/01 165-66; T. 8/30/01 10-15). Lacey's recantations were consistent with Defendant's exculpatory statements to the police. (TT 8/30/01 74-82, T. 8/24/01 130-32).

The State presented evidence that a nightgown that Lacey was wearing when the police arrived at the Martinez residence on the morning of July 10, 1999 contained semen stains that matched Defendant's DNA. (TT 8/24/01 62-63, 76-77, 89, 94-95, 124-25, 160-61; TT 8/29/01 13-23; 45-52). However, the evidence also indicated that it was not possible to determine when the semen had been deposited on the nightgown (TT 8/29/01 26, 40, 44, 54), that semen still could be found on a garment even after it had been washed (TT 8/29/01 27-28), that the extremely low sperm count in the semen samples on the nightgown could have resulted from washing (TT 8/29/01 29, 32), and that Lacey might have taken her nightgown from a pile of dirty laundry (T. 8/23/01 173-76). Moreover, vaginal swabs collected during a sexual assault examination on July 10 did not contain semen (TT 8/29/01 9-13); and the same examination also did not disclose any evidence of injury or trauma on Lacey's body, including her vaginal area. (TT 8/29/01 76 – 77; Ex. 46).

III. REASONS WHY THE PETITION FOR REVIEW SHOULD BE GRANTED

A. Defendant Was Deprived of his Constitutional Right to Effective Assistance of Trial Counsel

Defendant's central claim for post-conviction relief is that his trial attorney, Robert White, provided ineffective assistance of counsel, in violation of Defendant's rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article 2, § 24 of the Arizona Constitution. In order to establish such a claim, a defendant must show (1) "that counsel's performance was deficient," and (2) "that the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687 (1984).

With respect to the first Strickland requirement, the defendant must show that "counsel's representation fell below an objective standard of reasonableness" -- i.e., that counsel's conduct was not "within the range of competence demanded of attorneys in criminal cases." Id. at 687-88. With respect to the second requirement, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. The defendant need not show that "counsel's deficient conduct more likely than not altered the outcome in the case"; rather, the question is "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. at 693, 695. See also State v. Vickers, 180 Ariz. 521, 525-27, 885 P.2d 1086, 1090-92 (1994).

1. Defense counsel's deficiencies with regard to the central issue in the case -- whether the victim was telling the truth when she accused Defendant of sexual misConduct or when she recanted her accusations

The central issue at trial was whether the alleged victim, Lacey Lyness, was telling the truth when she accused Defendant of sexual misconduct on July 10, 1999 -- or when she later recanted the accusation (both before and during trial). With regard to that issue, the performance of Defendant's trial counsel was unconstitutionally deficient in several respects:

a. The prosecution sought to explain Lacey's recantations in large part by arguing that they were the result of her mother's having chosen Defendant over Lacey and having "isolated Lacey from her family, from her friends, from her schoolmates, [and] from her friends . . . by saying she's lying, . . . I don't believe her." (TT 8/31/01 36, 42-43, 94-95, 106). For this argument, the prosecution relied heavily on the expert testimony of Ms. Dutton that a "range of research" suggested that recantation of true statements of abuse was "not uncommon," and that "[o]verwhelmingly the research suggests that lack of the support from the mother of the victim is the most common prompt for recantation." (TT 8/24/01 29-30). With regard to that testimony, defense counsel's performance was deficient in two respects:

i. Defense counsel did not object to Ms. Dutton's above-described testimony, even though it was inadmissible under State v. Lindsey, 149 Ariz. 472, 473-74, 475, 720 P.2d 73, 74-75 (1986) (admission of expert testimony that "most people in the field feel that it's a very small proportion [of incest victims] that lie" was reversible error, because it went beyond providing information on "the behavioral characteristics of victims of child molesting" and effectively "quantifie[d] the probabilities of the credibility of another witness").

ii. Although defense counsel was familiar with Ms. Dutton and knew that she would testify for the State, defense counsel did not research the literature on recantation or consult with an expert on that subject prior to trial. (Petition for Post-Conviction Relief, App. at 14).[3] Thus, his cross examination of Ms. Dutton did little to address her testimony besides eliciting the point that "[t]he research doesn't specifically address when children take back or admit to a false allegation." (TT 8/24/01 31). Moreover, the defense had no expert testimony to counter Ms. Dutton's critical testimony. But the availability of such testimony is demonstrated by Defendant's PCR Exhibit 2 (App. at 34-116), which is the affidavit of Phillip W. Esplin, Ed.D, an experienced and highly qualified expert on child sexual abuse. In Dr. Esplin's opinion,

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[3] The allegations in the Petition for Post-Conviction Relief regarding defense counsel explicitly were based on undersigned counsel's interviews with Mr. White. That Petition stated that Defendant intended to call Mr. White as a witness at the requested hearing on Defendant's claims.

Ms. Dutton's "verbal quantification regarding the frequency of false recantation . . . [and] the frequency of motivational influences on a child that trigger a false recantation" was inaccurate and misleading in light of the empirical literature in the field. (App. at 36-38).

b. Eloy Police Officer Garrett Means testified that the alleged victim had told him during a pre-trial interview that Defendant did not actually have sex with her "but he had tried to." (TT 8/24/01 134-35). In closing, the prosecution used this testimony to argue (a) that Lacey's recantation was "inconsistent and [made] no sense," and (b) that Lacey's statements to Detective Means, even if taken a face value, indicated that Defendant was "guilty of attempted sexual conduct with a minor." TT 8/31/01 52-53). In that regard, defense counsel was ineffective in failing to impeach Detective Means with his own report on his interview with Lacey, the next-to-last paragraph of which stated as follows:

> I asked Lacey if anything else happened on the morning of 7-10-99 other than Luis getting mad at her for not cleaning the house. Lacey shook her head to say no. I asked Lacey if Luis spanked her or do [sic) anything else. She shook her head to say no. I confirmed with [Lacey] that Luis only got mad and left. She nodded her head to say yes.

(PCR Ex. 3, App. at 120).[4] Obviously, this paragraph indicated that Lacey in fact did not tell Detective Means that Defendant tried to have sex with her on the morning in question.

c. In addition to the expert testimony of Ms. Dutton, the prosecution had specific arguments for not crediting each of the recantations by Lacey about which the defense introduced any evidence. For example, the prosecution cast doubt on whether Lacey in fact had recanted to her mother by pointing out that Mrs. Martinez did not report the recantation to the police for several days, and that she did not mention it to Lacey's grandmother (with whom Lacey was staying). (TT 8/31/01 49-51). Moreover, the prosecution discredited Lacey's recantation at trial by asking the jury to compare her reticence and evasiveness on the witness stand to her demeanor when she accused Defendant in her first pretrial interview with Ms. Dutton. (TT 8/31/01 56-57). Nevertheless, defense counsel failed to introduce additional readily available evidence regarding the credibility of Lacey's recantation that was not subject to such attacks:

i. During defense counsel's own pretrial interview with Lacey, she was more cheerful and open than at trial, and she stated that Defendant had never tried to have sex with her. But defense counsel failed to introduce the videotape of that interview -- even though he was surprised by Lacey's reticence at trial,

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[4] Detective Means' report was marked as trial exhibit 45, but it was not offered into evidence by either side.

and even though he believed that the pretrial interview was much more favorable to Defendant. (App. at 18).

ii. Defense counsel failed to interview, and therefore did not present the testimony of, a friend of the Martinez family, Linda Flores.[5] Ms. Flores would have testified that Lacey told her that the alleged incident with Defendant did not happen, that Lacey did not like Defendant and wanted him to leave, and that Lacey was not upset when she spoke to Ms. Flores. (App. at 18).[6]

iii. Defense counsel failed to interview or call LuAnn Amos White. She would have testified that she spoke to Lacey by telephone a few minutes before Lacey called her mother on July 10, 1999 to accuse Defendant of sexual misconduct; that Lacey did not sound upset; and that Lacey said that she

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[5] The allegations in the Petition for Post-Conviction Relief regarding witnesses that defense counsel did not discover or present at trial explicitly were based on undersigned counsel's interviews with those witnesses.

[6] Both the videotape and Ms. Flores' testimony would have been admissible. Because the prosecution had introduced several out-of-court statements by Lacey that inculpated Defendant to prove the truth of the matters asserted therein, defense counsel could have offered the videotape and Ms. Flores' testimony to impeach Lacey. State v. Owen, 101 Ariz. 156, 158, 416 P.2d 589, 591 (1986), cert. denied 388 U.S. 915 (1967). And under Chambers v. Mississippi, 410 U.S. 284 (1973), exclusion of the videotape and Ms. Flores' testimony would have violated Defendant's constitutional rights to confront a witness against him (Lacey) and to present evidence in his defense.

was angry with Defendant because he would not let her read her book. (App. at 22). That testimony obviously would have supported the defense that Lacey's accusations were false (and that her recantations were true).

2. Defense counsel's failure to develop and present evidence that provided an exculpatory explanation for the State's DNA evidence

While the defense presented some evidence that arguably suggested possible exculpatory explanations for the DNA evidence (see supra at 4), those possibilities were so speculative that the prosecution was able to belittle them effectively in closing argument. (TT 8/31/01 98-103). However, if defense counsel had provided effective representation prior to and during trial, he would have uncovered and presented additional, and less speculative, evidence of an exculpatory explanation for the DNA evidence:

a. At trial, Lacey testified that she sometimes got clothes from the floor in a location where dirty clothes were kept - - but that she did not know whether or not she had gotten the nightgown she was wearing on the morning of July 10, 1999 from that location. (TT 8/23/01 174-75). During her pretrial interview with defense counsel, however, she stated that she did recall getting that nightgown from the dirty clothes pile on July 9. (App. at 20).

b. Prior to trial, defense counsel interviewed Defendant about whether he had masturbated prior to the time of the alleged offense. However, defense counsel conducted this interview with Defendant' s wife present, even though he knew or should have known that this would make it extremely difficult for Defendant to admit to having masturbated. Consequently, defense counsel failed to discover that Defendant would have testified that he had masturbated onto a nightgown from the household's dirty clothes pile prior to July 10, 1999. (App. at 21). That testimony, taken together with Lacey's statement during her pretrial interview that she did get the nightgown in question from the dirty clothes pile, would have provided a sensible exculpatory explanation for the State's DNA evidence that was omitted from the trial.[7]

3. The objective unreasonableness of defense counsel's performance

A central problem with the trial counsel's approach to this case is suggested by its statement that "[t]his Court presumes, as it must, that trial counsel exercised his trial strategy and discretion appropriately." (Att. A at 3, Para. 14). Defendant does not dispute that there is a presumption that counsel's actions "might be considered trial strategy." Strickland, 466 U.S. at 689. But that presumption is

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[7] Beyond the deficiencies discussed above, Defense counsel's inadequate pretrial investigation also resulted in his failing to discover and present additional exculpatory evidence. (See App, at 21-22).

not as absolute or conclusive as the trial court seems to have believed, and it is not enough to simply invoke "trial strategy" as a magic talisman without considering the reasonableness of counsel's conduct, especially when counsel has failed to conduct an adequate investigation. Wiggins v. Smith, 539 U.S. 510, 521-34 (2003); Vickers, 180 Ariz. at 524-27, 885 P.2d at 1089-92; ; State v. Fisher, 152 Ariz. 116, 117-120, 730 P.2d 825, 825-29 (1986); State v. Tapia, 151 Ariz. 62, 63-64, 725 P.2d 1096, 1097-98 (1986).

In this case, defense counsel's challenged actions cannot reasonably be justified as "trial strategy":

a. Given the critical importance of the alleged victim's recantations, and given defense counsel's knowledge that Ms. Dutton would testify for the State (see supra at 5 -7) there was no conceivable strategic reason for counsel not to research the literature on recantation or consult with an expert; and the trial court's conclusory statement that it "cannot find fault with counsel's decision to forego a 'battle of the experts'" (Att. A at 3, Para. 14) offers no such reason. As the Supreme Court noted in Wiggins, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 539 U.S. at 521. Defense counsel's failure to investigate the recantation issue in this case by itself made his performance objectively unreasonable. Gersten v. Senkowski, 426 F.3d 588, 607-611 (2d Cir. 2005) (failure to consult with or call medical and psychological experts in child sexual abuse case was ineffective).

b. There was also no conceivable reason for defense counsel not to impeach Detective Means with his own report (see supra at 7-8); and the trial court's Ruling suggests none.

c. This Petition's discussion of defense counsel's failure to introduce the videotape of his pretrial interview of Lacey, or to discover or present the testimony of Ms. Flores and Ms. White (see supra at 8-10), adequately refutes the trial court's conclusion -- which seems to have been based on its recollection of the trial proceedings -- that such evidence "would have been largely cumulative" (Att. A at 3, Para. 14).

d. The trial court's observation that defense counsel "had very limited options available to him to deal with the issue of semen on the victim's nightgown" (Att. A at 3, Para. 15) unintentionally suggests precisely why it was not reasonable for counsel to fail to develop and present additional (and available) evidence of an exculpatory explanation for the state's DNA evidence (see supra at 10-11).

4. The prejudicial effect of defense counsel's errors

Given the critical importance of the recantation and DNA issues, each of the errors by defense counsel discussed above raises "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Strickland, 466

U.S. at 695.[8] Even more clearly, the cumulative prejudicial impact of those deficiencies requires reversal of Defendant's convictions. Harris v. Wood, 64 P.3d 1432 (9th Cir. 1995) (cumulative impact of multiple errors by counsel); State v. Vickers, supra (discussing multiple deficiencies in counsel's performance); see also Tapia, 151 Ariz. at 64, 725 P.2d at 1098 ("When we consider that the defendant does not have to prove his innocence, but only raise a reasonable doubt about his guilt, the evidence which should have been produced becomes even more important").

B. Defendant's Claims Are Not Precluded

Without any explanation, the trial court's Ruling of November 4, 2005 found that Defendant's ineffective-assistance-of-trial-counsel claims were precluded. (Att. A at 2, Para. 13(a)). The following paragraphs will demonstrate why Defendant's claims are not precluded under Ariz. R. Crim. P. 32.2, notwithstanding the April 28, 2003 dismissal of a previous notice of post-conviction relief in this case (see supra at 2).[9]

---

[8] In stating (without further explanation) that "this Court cannot find that if trial counsel had done everything suggested by counsel in this Post Conviction Relief, the result would have changed" (Att. A at 3, Para. 16), the trial court appears to have imposed on Defendant a more onerous burden with regard to "prejudice" than Strickland requires.

[9] The current Petition for Post-Conviction Relief fully explained the following reasons why Defendant's claims were not precluded. (See App. at 23-28).

1. Defendant received ineffective assistance of counsel with regard to the first Notice of Post-Conviction Relief

a. Most claims of "trial error" are precluded under Rule 32.2(a) if the defendant did not raise them "at trial, on appeal, or in a previous collateral proceeding." 2002 Comment to Rule 32.2; Stewart v. Smith, 202 Ariz. 446, 46 P.3d 1067 (2002). However, if the failure to raise a claim at trial, on appeal, or in a previous collateral proceeding is the result of ineffective assistance of counsel, the claim is not precluded. State v. Jackson, 209 Ariz. 13, 14-15, 97 P.3d 113, 114-15 (App. 2004); State v. Pruett, 185 Ariz. 128, 130-31, 912 P.2d 1357, 1359-60 (App. 1995); State v. Herrera, 183 Ariz. 642, 647, 905 P.2d 1377, 13 82 (App. 1995).

b. In State v. Armstrong, 186 Ariz. 470, 475-76, 862 P.2d 230, 235-36 (App. 1993), this Court stated that there is "no constitutional right to effective assistance of counsel at post-conviction proceedings." But that statement was dictum; and Armstrong was decided before State.v. Pruett, supra, State v. Spreitz, 202 Ariz. 1, 39 P.3d 525 (2002), and Halbert v. Michigan, 542 U.S. ___, 125 S.Ct. 2582 (2005), all of which make it clear that a defendant does have constitutional right to effective assistance of counsel in post-conviction relief proceedings with respect to a claim of ineffective assistance of counsel:

i. In Pruett, the defendant pled guilty and no contest to several sexual offenses. Thereafter, he filed an initial petition for post-conviction relief, and

then a second petition for post-conviction relief raising for the first time a claim that his previous Rule 32 counsel was ineffective. The Court of Appeals held that the defendant had a constitutional right to effective assistance of counsel with regard to his first Rule 32 petition -- because Rule 32 was the only means available for a pleading defendant to exercise his "constitutional right to appellate review" -- and that the defendant's second Rule 32 petition therefore was not precluded. 185 Ariz. at 130-131, 912 p.2d at 1359-60.

ii. As in Pruett, the only avenue available to Defendant for review of the ineffective-assistance-of-trial-counsel claims presented in this Petition was a Rule 32 petition. State v. Spreitz, 202 Ariz. 1, 3, 39 P.3d 525, 527 (2002); State v. Jones, 185 Ariz. 471, 482, 917 P.2d 200, 211 (1996).

Consequently, with regard to those claims Defendant was entitled to effective assistance of post-conviction counsel.

iii. The foregoing conclusion is made even more clear by Halbert v. Michigan, supra. In that case, the Court held that the United States Constitution required "the appointment of counsel for defendants, convicted on their pleas, who [sought] access to first-tier review in the Michigan Court of Appeals," even though such review was discretionary, rather than of right, under Michigan law. Id. at 2586. By the same token, under Arizona law a first Rule 32 petition is the prescribed mechanism for "first-tier" review of a

defendant's claims of ineffective assistance of trial counsel.

c. In this case, it is clear that Defendant did not actually receive effective assistance from previous Rule 32 counsel (Harriette Levitt):

i. The fact that previous Rule 32 counsel did not uncover or raise the ineffective-assistance-of-trial-counsel claims discussed in this Petition by itself shows that she was ineffective.

ii. Ms. Levitt's failure to raise the claims analyzed in section II, above may be attributable in part to the fact that she never contacted trial counsel and apparently did nothing besides reviewing "the transcripts and trial file" before notifying this Court that she could "find no colorable claims pursuant to Rule 32, Arizona Rules of Criminal Procedure." (Notice filed Feb. 14, 2003; App at 25). Obviously, Rule 32 counsel cannot competently evaluate the effectiveness of trial counsel (especially with regard to pretrial preparation) by simply reviewing the transcripts and trial file.

iii. Ms. Levitt also was ineffective in her communications with Defendant. Between February 12 and May 16, 2003, Ms. Levitt did send letters to Defendant informing him of her inability to find any arguable issues under Rule 32, of the time frame within which Defendant would need to file a "supplemental pro se petition," and of the deadline for filing a petition for review of the trial court's dismissal of the first Rule 32 notice. However, those letters were

written in English - - even though Defendant Mr. Martinez wrote to Ms. Levitt on March 3, 2003, in Spanish, and informed her that he did not read English and did not "understand anything of what is happening." (App. at 26). Thus, it is hardly surprising that Defendant was not able to file a timely pro se petition for post-conviction relief.

2. Defendant's claims are "of sufficient constitutional magnitude"

Even if Defendant had not received ineffective assistance of counsel with regard to his previous Rule 32 Notice, the claims raised by this petition would not be precluded:

a. If a post-conviction claim is "of sufficient constitutional magnitude" -- i.e., if the claim involves a right that is necessary to a fair trial, personal to the defendant, and waivable only by the defendant himself -- then the State must prove that the defendant "knowingly, voluntarily, and intelligently" waived the claim in order for it to be precluded under Rule 32.2(a)(3). Stewart v. Smith, 202 Ariz. 446, 449-50, 46 P.3d 1067, 1070-71 (2002). More specifically:

> [I]f a petitioner asserts ineffective assistance of counsel for the first time in a successive Rule 32 petition, the question of preclusion is determined by the nature of the right allegedly affected by counsel's ineffective performance. If that right is of sufficient constitutional magnitude to require personal waiver by the

defendant and there has been no personal waiver, the claim is not precluded.

Stewart v. Smith, supra, 202 Ariz. at 450, 46 P.3d at 1071.

b. All of the instances of ineffectiveness of trial counsel discussed in this Petition affected either Defendant's constitutional right to confront the witnesses against him or his constitutional right to present evidence in his defense -- or both. Under Chambers v. Mississippi, 410 U.S. 284 (1973), both of these rights are sufficiently fundamental and necessary to a fair trial to be applicable to the States under the Due Process Clause of the Fourteenth Amendment; and both obviously require personal waiver by the defendant. But there is no evidence that Defendant knowingly, voluntarily, and intelligently waived these rights. Under Stewart v. Smith, supra, Defendant's ineffective-assistance-of-trial-counsel claims therefore are not precluded.

IV. CONCLUSION

For the reasons stated above, this Court should grant this Petition for Review and reverse the judgment of the court below.

RESPECTFULLY SUBMITTED this 3d day of January, 2006.

/s/_____
Robert Bartels
Counsel for
Defendant/Petitioner

ATTACHMENT A

ATTACEMENT A

IN THE SUPERIOR COURT
PINAL COUNTY
STATE OFARIZONA

Filed in Court Record
Date Filed: 11/04/2005
Time Filed: 01:35 PM

DATE: 11/04/2005

THE HON GILBERTO V FIGUEROA
Division: 4
Court Reporter: NONE

KRISTI YOUTSEY RUIZ, CLERK
By Phyllis Yedica Judicial Assistant

THE STATE OF ARIZONA, Plaintiff,	**CR99026111**
vs.	MINUTE ENTRY: ACTION
LUIS MARIANO MARTINEZ Defendant(s).	**RULING ON RULE 32 PETITION**

This matter was.reassigned to this Court for rulings on Defendant Martinez's second Rule 32 Petition. The Court has now made an exhaustive review of the file, and as deemed necessary or appropriate, of certain transcripts, and FINDS as follows:

1) Defendant Martinez filed his first Notice of Post Conviction Relief through Counsel, Ms. Harriett Levitt, on May 28, 2002.

2) This first filing was made more than 90 days after Entry of Judgment of Guilt, but was filed during the appeal and was therefore, within the prescribed timeline.

3) Thereafter, on February 14, 2003, after numerous extensions, Counsel Levitt filed a Rule 32.4 Notice indicating that she had been unable to identify any colorable claims.

4) The Defendant failed to file a Pro Se supplement and the Court denied all relief and dismissed the Notice on April 28, 2003.

5) The Appeal was reinstated and relief was denied on March 22, 2004 by the Court of Appeals.

6) The Supreme Court denied review on September 22, 2004.

7) The Defendant filed his second Notice of Post Conviction Relief on October 27, 2004.

8) At page 3, paragraph 7 of the most recent Notice, Defendant claims that even though the Notice is NOT TIMELY, it is appropriately filed because "The Defendant's failure to file a timely notice...was without fault on the Defendant's part." The Defendant then wholly fails to offer any reasonable explanation for claiming the untimely filing is not "his fault."

9) The October 27, 2004 Notice was filed more than 30 days after the Arizona Supreme Court denied review on September 22, 2004.

10) Therefore, this Court is compelled to find that the Notice was not timely filed and that Defendant failed to state valid grounds for this Court to find the untimely filing is excusable under Rule 32.1(f);

11) Having noted all of the above, this Court can now summarily dismiss the October 27, 2004 Notice. However, rather than issuing a summary Order of dismissal, this Court will address the two most cogent issues raised by Defendant's Notice dated October 27,2004 and the Petition filed on February 7, 2005, the Response from the State dated June 29, 2005 and the Defendant's Reply dated July 18, 2005;

12) Counsel has filed and this Court received and reviewed over one hundred (100) pages of Pleadings and exhibits, all of which can be reduced to two (2) basic arguments:

    1) Trial counsel was incompetent because:

        a) he did not properly prepare for and did not present certain evidence at trial; and
        b) he did not prevent certain evidence from being admitted during the trial; and

    2) Appellate/Post Conviction Relief counsel was incompetent because

she failed to raise the issues noted above;

13) This Court presided over the trial and has reviewed the record and now FINDS:

a) Counsel's arguments do not raise a colorable claim of ineffective assistance of trial counsel, and, in any event, that claim is precluded;

b) Counsel's arguments do not raise a colorable claim of ineffective assistance of appellate/Post Conviction Relief and, in any event, the claim lacks any merit;

c) Counsel failed to raise the one issue that might have a chance of resulting in review. (ie., the 8th amendment issue re: the length of the mandatory sentence imposed) even though trial counsel raised the issue at sentencing.

14) First, this Court will address the issue of trial counsel's preparation and trial work. As indicated above, this Court presided over the trial. This Court, along with the jurors, watched and listened as the victim repeatedly responded, "I don't know," or "I don't remember," to question after question from the State. This Court and the jury heard her recantations on the stand and

her "impeachment" by her prior statements. Calling witnesses to testify about her recantation or playing a videotape of her defense interview would have been largely cumulative and was not likely to have changed the result. ST v Salazar, 146 Az 540, 707 P.2d 944 (App 1974), ST v Valdez, 160 Az 9, 770 P.2d 313 (1989). The jury was free to and did believe the victim's original reports. This Court presumes, as it must, that trial counsel exercised his trial strategy and discretion appropriately. ST *v* Shurz, 176 Az 46, 852 P.2d 156 (1993), Strickland v Washington, 466 US 668, 104 S. CT 2052, 80L. Ed 2d (1984).

Likewise, this Court cannot find fault with counsel's decision to forego a "battle of experts" on the Child Sexual Abuse Accommodation Syndrome. Counsel effectively cross-examined Ms. Dutton with respect to what motives a child might have to accuse someone of sexual misconduct. This Court cannot find merit in counsel's extended arguments that an opposing expert could have made a difference. The real issue is whether Ms. Dutton vouched for the victim's credibility. This Court cannot find that Ms. Dutton did so by stating that the literature "tends to suggest" that recantation is "not uncommon." Nor did she comment on the "truthfulness" of the victim when she

responded that "Overwhelmingly, the research suggests that lack of support from the mother of the victim is the most common prompt for recantation." Under the circumstances, this Court is comfortable with the fact that the jury had the opportunity to and did weigh the conflicts in the testimony and after approximately eight (8) hours of deliberation, resolved the conflicts in favor of the State and found unanimously that the evidence proved defendant's guilt beyond a reasonable doubt.

15) In stating the foregoing, this Court is mindful that Defendant, his family and now present counsel, have assailed trial counsel's performance and have strongly criticized Appellate/Post Conviction Relief Counsel Levitt as well. On the other hand, this Court strongly believes that deference is due to the fact that trial counsel had very limited options available to him to deal with the issue of semen on the victim's nightgown. He did a credible job suggesting the victim's mother wore the nightgown or that the semen got on the nightgown when the victim climbed into her mom's bed or when she changed clothes in the bathroom.

16) Even were this Court inclined to do so, this Court cannot find that if trial counsel had done everything suggested by counsel in this Post Conviction Relief, the result would have changed.

17) Based on the foregoing, this Court cannot find that original appellate/PCR counsel's performance fell below the standards set forth in Strickland, Salazar, Valdez, supra.

Therefore, the Court having found that none of the issues raised by counsel present a colorable claim, counsel's request for an evidentiary hearing is DENIED.

Further, this Court having fully reviewed the record and having found the petition untimely,

IT IS ORDERED the Relief requested is DENIED and the Petition is DISMISSED; and,

FURTHER, the Court having considered the arguments of counsel and having found that all issues identified by counsel could have been raised in the original.

PCR and that are therefore precluded, now therefore:

IT IS ORDERED all Relief requested is DENIED and the Petition is DISMISSED; and,

FURTHER, the Court having reviewed the record and having considered all arguments made by counsel, the Court having found no merit for the allegations made; now

THEREFORE, IT IS ORDERED all Relief Requested is DENIED, and the Petition for Post Conviction Relief is DISMISSED.

Mailed/distributed copy: 11/07/2005

cc:
ROBERT BARTELS

HON. TERRY GODDARD
ATTORNEY GENERAL OF AZ
1275 W. WASHINGTON
PHOENIX, AZ 85007

Office Distribution:
SYLVIA R LAFFERTY
COUNTY ATTORNEY
VICTIMS ASSISTANCE

ATTACHMENT B

ATTACHMENT B

IN THE SUPERIOR COURT

PINAL COUNTY,

STATE OF ARIZONA

DATE: 12/01/2005

Filed in Court Record

Date Filed: 12/01/2005
Time Filed: 04:10 PM

THE HON GILBERTO v FIGUEROA
Division: 4

By, Phyllis Yedica Judicial Assistant

THE STATE OF ARIZONA,
Plaintiff,
vs.
LUIS MARIANO MARTINEZ,
Defendant(s).

CR99026111

RULING ON MOTIONS/ISSUES

This Court has reviewed Defendant's Motion for Rehearing; has deemed it a Motion for Reconsideration, and now FINDS and IT IS ORDERED as follows:

1) Defendant's Petition for Post Conviction Relief "filed" on October 27,2004 at page 3, paragraph 7 (A & B) alleges that Defendant's failure to timely file was without his fault;

2) The Court noted that admission/submission at Finding No. 8 in its November 4, 2005 minute entry;

3) The Court did follow-up regarding Defendant's allegations that he brought the documents to the Clerk of the Court on October 18, 2004 but the Deputy Clerk refused to "file" the Petition without a Judge's approval; and the Court found Defendant's allegations to be accurate and has now taken steps to correct the issue for future filings;

4) Not-with-standing the acknowledgment above, that the Clerk of the Court erred, the Court also notes that the November 4, 2005 minute entry at Pg. 2 of 4, paragraph 11, states the Petition is <u>not</u> being summarily <u>dismissed</u> as untimely; and

5) The Court DISMISSED the Petition after finding no colorable claims and/or after having found all issues precluded and/or without merit;

6) The Court did find the Notice untimely but considered the issues raised;

THEREFORE, IT IS ORDERED:

1) No Responsive Pleading is required;

2) The issue of timeliness was not a dispositive factor;

3) The Relief requested was denied on multiple grounds, all supported by the record and the law; and

4) The Post Conviction Petition was Dismissed on grounds which are supported by the record; and

NOW THEREFORE, the Motion for Reconsideration is DENIED and all prior Orders, except the FINDING of untimeliness, are AFFIRMED; the timeliness issue is NOT dispositive and does not call for this Court to reverse itself.

DATED THIS 2nd day of December, 2005.

Hon. Gilberto V. Figueroa
Pinal County Superior Court

Mailed/distributed copy: 12/02/2005

cc:
ROBERT BARTELS

Office Distribution:
SYLVIA R. LAFFERTY

HON. TERRY GODDARD
ATTORNEY GENERAL OF AZ.
1275 W WASHINGTON
PHOENIX, AZ 85007

Copy of the foregoing
mailed this 3d day of
January, 2006, to:

Sylvia Lafferty
Deputy County Attorney
P.O. Box 887
Florence, AZ 85232
Counsel for State of Arizona

The Hon. Terry Goddard
Attorney General of Arizona
1275 West Washington
Phoenix, AZ 85007

by: /s/
Robert Bartels

REPLY BRIEF

Supreme Court, U.S.
FILED
APR 18 2011
OFFICE OF THE CLERK

No. 10-1001

IN THE

Supreme Court of the United States

LUIS MARIANO MARTINEZ,

Petitioner,

v.

CHARLES L. RYAN, Director,
Arizona Department of Corrections,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

ROBERT BARTELS
Counsel of Record
SANDRA DAY O'CONNOR COLLEGE OF LAW
ARIZONA STATE UNIVERSITY
Tempe, AZ 85287-7906
(480) 965-7053
Robert.Bartels@asu.edu

Attorney for Petitioner

235716

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF CITED AUTHORITIES	iii
ARGUMENT	1
I. PETITIONER'S FEDERAL INEFFECTIVE-ASSISTANCE-OF-TRIAL-COUNSEL CLAIM IS NOT SUBJECT TO PROCEDURAL DEFAULT FOR TWO INDEPENDENTLY SUFFICIENT REASONS	1
A. The procedural ground on which the state court denied Petitioner's federal claims was not "adequate"	1
B. There is cause and prejudice to excuse any procedural default of Petitioner's ineffective-assistance-of-trial-counsel claims	3
II. PETITIONER HAS NEVER ARGUED THAT HIS STATE-CREATED PROCEDURAL RIGHT TO COLLATERAL-REVIEW COUNSEL CREATED A FEDERAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL	8

Table of Contents

Page

III. THIS CASE PRESENTS NO GENUINE ISSUE OF "RETROACTIVITY" UNDER *TEAGUE V. LANE* 10

IV. PETITIONER DID NOT PROCEDURALLY DEFAULT HIS INEFFECTIVE-ASSISTANCE-OF-TRIAL-COUNSEL CLAIM, OR HIS RIGHT TO EFFECTIVE ASSISTANCE OF FIRST POST-CONVICTION COUNSEL WITH RESPECT TO THAT CLAIM, BY FAILING TO RAISE AND LITIGATE IT HIMSELF IN THE FIRST POST-CONVICTION PROCEEDING 12

CONCLUSION 13

TABLE OF CITED AUTHORITIES

Page

CASES

Coleman v. Thompson,
501 U.S. 722 (1991) 4, 9, 13

Douglas v. California,
372 U.S. 353 (1963) ..... *passim*

Edwards v. Carpenter,
529 U.S. 446 (2000) 6

Gosier v. Welborn,
175 F.3d 504 (7th Cir. 1999) 10

Halbert v. Michigan,
545 U.S. 605 (2005) ..... *passim*

Hopkins v. Reeves,
524 U.S. 88 (1998) 10

McConnell v. Rhay,
393 U.S. 2 (1968) 11

Murray v. Giarratano,
492 U.S. 1 (1989) 4

Ross v. Moffitt,
417 U.S. 600 (1974) 3, 4, 5, 7

Schiro v. Farley,
510 U.S. 222 (1994) 10

Cited Authorities

Page

Strickland v. Washington,
466 U.S. 668 (1984) 7

Teague v. Lane,
489 U.S. 288 (1988) 10, 11

Walker v. Martin,
___ U.S. ___, 1131 S. Ct. 1120 (2011) 2

STATUTES

28 U.S.C. § 2244(d)(1) 7

28 U.S.C. § 2244(d)(2) 7

28 U.S.C. § 2254(i) 9, 10

ARGUMENT

For the reasons that follow, Respondent's Brief in Opposition fails to refute the Petition's showing that the Court of Appeals' dispositive holding -- that Petitioner did not have a federal right to effective assistance of first post-conviction counsel with respect to any ineffective-assistance-of-trial-counsel claim, even though the first post-conviction proceeding provided the first opportunity for Petitioner to raise such a claim -- was contrary to this Court's decisions in *Douglas v. California*, 372 U.S. 353 (1963), and *Halbert v. Michigan*, 545 U.S. 605 (2005).

I. PETITIONER'S FEDERAL INEFFECTIVE-ASSISTANCE-OF-TRIAL-COUNSEL CLAIM IS NOT SUBJECT TO PROCEDURAL DEFAULT FOR TWO INDEPENDENTLY SUFFICIENT REASONS

A. The procedural ground on which the state court denied Petitioner's federal claims was not "adequate"

Respondent's argument that the state court's finding of preclusion was an adequate and independent state ground for the dismissal of Petitioner's ineffective-assistance-of-trial-counsel claim (BIO at 5-7) is not persuasive:

1. Respondent offers no explanation for the conclusory statement that "[b]ecause the 'adequacy' of the preclusion finding in this case concerns only Petitioner's underlying ineffective-assistance-of-trial-counsel claims, it is clear that this finding was an adequate ground for denying Petitioner's claim." (*Id.*). Perhaps this is because

Respondent's parenthetical assertion that this Court stated in *Walker v. Martin*, ___ U.S. ___, 1131 S. Ct. 1120, 1127-28 (2011), that "a finding of preclusion is an adequate ground for denying relief if it is 'firmly established and regularly followed'" (BIO at 6) is incorrect. What this Court did state in *Walker* was that "[t]o qualify as an 'adequate' procedural ground, a state rule must be 'firmly established and regularly followed.'" 131 S. Ct. at 1127 (emphasis added). In short, being "firmly established and regularly followed" is a necessary -- but not a sufficient -- condition for "adequacy." Thus, this Court noted in *Walker* that "a state ground would be inadequate if the challenger shows a 'purpose or pattern to evade constitutional guarantees,'" *id.* at 1130-31; and such a purpose or pattern is precisely what the Petition has demonstrated (at 9-12).

2. Ultimately, Respondent argues that if "the finding of preclusion in this case frustrated his right to assert a claim that his trial counsel was ineffective," that "is a natural consequence of this Court's recognition that a state-court finding of procedural default constitutes an adequate and independent ground for denying habeas relief." (BIO at 7). But that remarkably extreme argument is not supported by the cases that Respondent cites, and it is inconsistent with other decisions by this Court and the Ninth Circuit's opinion in this case (*see* Pet. at 9).

3. In any event, whether the state court's preclusion ruling was "adequate" is not dispositive. As Respondent recognizes (BIO at 8), even an adequate default is excused if it was the product of a violation of the defendant/petitioner's constitutional right to effective assistance of counsel. (Pet. at 12).

B. There is cause and prejudice to excuse any procedural default of Petitioner's ineffective-assistance-of-trial-counsel claims

1. With regard to the central issue in this case -- whether Petitioner had a federal constitutional right to effective assistance of first post-conviction counsel with respect to any ineffective-assistance-of-trial-counsel claim -- Respondent does not challenge Petitioner's *Douglas/Halbert* argument directly. Thus, Respondent does not dispute that in Arizona, a defendant must raise any ineffective-assistance-of-trial-counsel claim for the first time in a petition for post-conviction relief, or that post-conviction review of ineffective-assistance-of-trial-counsel claims meets both requirements for "first-tier" review under *Douglas* and *Halbert*, or that a defendant has a federal constitutional right to appointed counsel on first-tier review, or that the right to appointed counsel necessarily means the right to effective assistance of counsel. (*See* BIO at 8-15). Instead, Respondent seeks to distinguish *Douglas and Halbert*, and to analogize this case to *Ross v. Moffitt*, 417 U.S. 600 (1974), primarily on some of the grounds suggested by the Court of Appeals. As the following paragraphs will show, Respondent's arguments regarding *Douglas*, *Halbert*, and *Ross* are without merit.

2. Respondent's first attempt to distinguish *Douglas* and *Halbert* (BIO at 9-10) is substantively identical to the Court of Appeals' reasoning with respect to whether Petitioner's first post-conviction proceeding amounted to "first-tier" review for purposes of *Douglas* and *Halbert*. The Petition (*see* secs. II(A)(1)-(4), pp. 13-15) has demonstrated the several flaws in that reasoning,

and the Brief in Opposition makes no attempt to address those flaws.

3. Respondent's attempt to analogize this case to *Ross* (BIO at 10-11) echoes the Court of Appeals' reasoning in rejecting of Petitioner's argument that he was "ill equipped" to represent himself in the first post-conviction proceeding with respect to any ineffective-assistance-of-trial-counsel claims. 623 F.3d at 741 (App. at 19a). But as the Petition has shown (at 15-17), the Court of Appeals' reasoning has three major flaws -- none of which is addressed by the Brief in Opposition.

4. With respect to Respondent's citation to Justice Stevens' dissent in *Murray v. Giarratano*, 492 U.S. 1, 24 (1989) (BIO at 11-12), it is sufficient to say (a) that the majority in *Giarratano* did not even mention Justice Stevens' dissenting point about ineffective-assistance claims (perhaps because the issue in that case was the validity of a lower court order that required appointment of counsel for any death row inmate who wished to pursue state habeas proceedings on any ground), and (b) that *Giarratano* was decided before *Coleman v. Thompson*, in which this Court explicitly recognized that there might be an exception to the general rule that "there is no right to counsel in state collateral proceedings" when "state collateral review is the first place a prisoner can present a challenge to his conviction." 501 U.S. at 755.

5. Although Respondent said nothing, in any filing in the District Court or the Court of Appeals, about any concern that recognition of the right to effective assistance of first post-conviction counsel (with respect to ineffective-assistance-of-trial-counsel claims that were prohibited

on direct appeal) might lead to an "infinite continuum of litigation," the Brief in Opposition (at 13-15) devotes almost three pages to that concern. But Respondent's attempts to refute Petitioner's demonstration that the Court of Appeals' apparent fear of a possible infinite continuum of litigation was unwarranted (Pet. at 19-21) are confused and unpersuasive:

a. In response to Petitioner's primary theoretical point -- that recognition of right to effective assistance of **first** post-conviction counsel would not, as the Court of Appeals thought, imply a right to effective assistance of **second** post-conviction counsel (with respect to the effectiveness first post-conviction counsel) under *Douglas*, *Halbert*, and *Ross* (Pet. at 20-21) -- Respondent argues as follows:

> As noted above, however, in order to constitute cause for a procedural default, a claim must be presented as a separate claim. *[Edwards v.] Carpenter*, 529 U.S. [446 (2000)] at 451. Thus, a claim that collateral-review counsel was ineffective would have to be asserted not during a "second-tier review," but as an independent claim in a second collateral-review proceeding.

BIO at 14 (emphasis in original). This argument is incoherent, and it fails to answer, or even to meaningfully address, Petitioner's primary point regarding the Court of Appeals' infinite-continuum concern:

i. Although the Brief in Opposition does not say what it means by a "separate" or "independent" claim, it seems to be interpreting those terms as

meaning "freestanding," or "independently sufficient to grant relief." But when (as here), a claim of ineffective assistance of counsel that is made solely to provide cause to excuse the procedural default of another, underlying constitutional claim, it inherently cannot be sufficient to grant relief independently of the underlying claim. Instead, as *Edwards* itself makes clear, the procedural-default-excusing ineffective-assistance claim must be "independent" of the underlying claim for relief only in the sense that the alleged deficiency in counsel's performance must have been of constitutional dimension; and it must have been separately/independently exhausted in state court:

> [I]n certain circumstances counsel's ineffectiveness in failing properly to preserve the claim for review in state court will suffice. . . . Not just any deficiency will do, however; the assistance must have been so ineffective as to violate the Federal Constitution. . . . **In other words,** ineffective assistance adequate to establish cause for the procedural default of some **other** constitutional claim is **itself** an independent constitutional claim. And we held in *Carrier* that the principles of comity and federalism that underlie our long-standing exhaustion doctrine . . . require **that** constitutional claim, like others, to be first raised in state court.

529 U.S. at 541-42 (citations omitted; some emphasis added).

ii. Because any claim that a defendant's failure to make an ineffective-assistance-of-trial-counsel claim in his first state post-conviction proceeding is excused by first post-conviction counsel's ineffectiveness will be raised in a **second** post-conviction proceeding, adjudication of the "gateway" first-post-conviction-counsel claim necessarily will require **second**-tier review of the underlying trial-counsel claim -- because first post-conviction counsel's failure to raise the trial-counsel claim could not be ineffective, under *Strickland v. Washington*, 466 U.S. 668 (1984), unless the trial-counsel claim was valid. Thus, under *Ross* the defendant would not be constitutionally entitled to effective assistance of **second** post-conviction counsel; and that would mean that in any **third** post-conviction proceeding, the defendant could not raise a new ineffective-assistance-of-trial-counsel claim and then seek to excuse his failure to raise that claim in the second (or first) post-conviction proceeding by arguing that second post-conviction counsel was ineffective. Thus, the "continuum" of litigation regarding the effectiveness of all counsel, rather than being potentially "infinite," would end with the second post-conviction proceeding.

b. Respondent complains that Petitioner's practical infinite-continuum point -- regarding the one-year statute of limitation in 28 U.S.C. § 2244(d)(1) (Pet. at 21) -- "fails to acknowledge that 28 U.S.C. § 2244(d)(2) allows for the tolling of the 1-year limitations period while a timely-initiated state post-conviction relief proceeding is pending." (BIO at 14). But § 2244(d)(2) is relevant only to the extent that, at the end of each stage of the "continuum," the defendant very quickly could find new counsel to very promptly present to the state courts some new ineffective-

assistance-of-trial-counsel claim; and it is unrealistic to suppose that this would happen often. In any event, this practical point is moot in light of the primary theoretical point addressed in paragraphs a(i)-(ii), above.

c. Respondent's paraphrasing of the third paragraph of Petitioner's discussion of the "infinite continuum" concern (BIO at 14-15) conflates two related, but separate, points and, more importantly, omits part of the second point (*see* Pet. at 21). Respondent then argues that Petitioner "presumes that appointed collateral-review attorneys will, as a matter of course, fail to execute their obligations under state law." (*Id.* at 15). But Petitioner has presumed no such thing. The Petition's ultimate point -- which Respondent fails to quote -- is that the Court of Appeals' decision effectively means that "if [a defendant] is deprived of that right [to effective assistance of trial counsel], he has no **federal right** to an effective remedy." (Pet. at 21; emphasis added).

II. PETITIONER HAS NEVER ARGUED THAT HIS STATE-CREATED PROCEDURAL RIGHT TO COLLATERAL-REVIEW COUNSEL CREATED A FEDERAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

A. Approximately six pages of the Brief in Opposition (at 16-22) are devoted to a subsection II(B) entitled "Petitioner's state-created procedural right to collateral-review counsel did not create a right to 'effective' assistance of counsel." This is puzzling, since Petitioner has never argued that his state-law right to appointed counsel in a first post-conviction relief proceeding

gave rise to any federal constitutional right to effective assistance of counsel. Moreover, almost everything in Respondent's subsection II(B) is irrelevant to the central issue presented in this case, given this Court's holdings in *Douglas* and *Halbert*.

B. There is, however, one argument in Respondent's subsection II(B) which has some relevance to this case (albeit not to the title of that subsection): that "a conclusion that a defendant may allege ineffective assistance of collateral-review counsel as cause to excuse a procedural default" would be inconsistent with 28 U.S.C. § 2254(i). (BIO at 210). But this argument has no merit, at least in this case, for the following reasons:

1. Section 2254(i) provides that "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a **ground for relief** in a proceeding arising under section 2254." (Emphasis added). In this case, however, Petitioner is asserting the ineffectiveness of first post-conviction relief counsel not as a "ground for relief," but as a reason why his actual ground for relief -- the ineffectiveness of his trial counsel -- should not be procedurally defaulted.

2. As the Petition effectively has demonstrated (at 8-21), applying § 2254(i) to this case would vitiate (a) the "independent and adequate state ground" requirement, (b) the rule from *Coleman v. Thompson*, 501 U.S. 722, 755 (1991), that a procedural default is excused when it is caused by constitutionally ineffective assistance of counsel, and (c) the constitutional right to counsel for "first-tier" review that was recognized in *Douglas* and

Halbert. Obviously, no statutory provision, including § 2254(i), properly could have such unconstitutional effects.[1]

III. THIS CASE PRESENTS NO GENUINE ISSUE OF "RETROACTIVITY" UNDER *TEAGUE V. LANE*

A. Respondent did not raise *Teague v. Lane*, 489 U.S. 288 (1988), or any issue of "new rule" retroactivity, in his Answer in the District Court (USDC DN-10) or in his Answering Brief in the Court of Appeals.[2] Nevertheless, the Brief in Opposition (at 22) makes a "new rule" argument -- in a single sentence that is both cryptic and conclusory (with an equally conclusory footnote). Given Respondent's failure to make a "new rule" argument in the Court of Appeals and the perfunctory nature of that argument in the Brief in Opposition, this Court need, and should, not consider it here. *See Hopkins v. Reeves*, 524 U.S. 88, 94 n. 3 (1998); *Schiro v. Farley*, 510 U.S. 222, 228-29 (1994).

---

1. In only one of the cases that Respondent cites to support his § 2254(i) argument (BIO at 21) did the court apply § 2254(i) to reject a claim that ineffectiveness of post-conviction counsel supplied cause to excuse a procedural default (of an underlying claim other than ineffective assistance of counsel); and the court did so perfunctorily, without any explanation or citation to authority. *Gosier v. Welborn*, 175 F.3d 504, 510-11 (7th Cir. 1999).

2. In the District Court, Respondent's Response to Petitioner's Objections to Report and Recommendation briefly raised a Teague issue, even though neither the Report nor Petitioner's objections had done so (USDC DN-14 at 8-10); but as noted above, Respondent abandoned Teague in the Court of Appeals.

B. In any event, there is no genuine new-rule/retroactivity issue in this case, for two independently sufficient reasons:

1. Because the right to counsel on first-tier review on which this case turns was dictated by this Court's 1963 decision in *Douglas v. California*, long before Petitioner's state-court trial and post-conviction proceedings, there is no new-rule/retroactivity issue at all.

2. Even if the right to counsel in the first proceeding in which an ineffective-assistance-of-trial-counsel claim could be raised somehow amounted to a "new" rule, it would be retroactively applicable under *Teague*, 372 U.S. at 311, 313, because it was a "watershed" rule "without which the likelihood of an accurate conviction is seriously diminished." In *Teague* itself, this Court recognized the right to counsel at trial as a primary example of a "watershed" rule, 489 U.S. at 311; and this Court has held the right to counsel to be retroactive in other contexts, including sentencing. *McConnell v. Rhay*, 393 U.S. 2, 3 (1968). Perhaps most importantly, this Court recognized in *Rhay* that the *Douglas* right to counsel on first-tier review had been "applied retroactively," and that it related to "the very integrity of the fact-finding process." *Id.*

IV. PETITIONER DID NOT PROCEDURALLY DEFAULT HIS INEFFECTIVE-ASSISTANCE-OF-TRIAL-COUNSEL CLAIM, OR HIS RIGHT TO EFFECTIVE ASSISTANCE OF FIRST POST-CONVICTION COUNSEL WITH RESPECT TO THAT CLAIM, BY FAILING TO RAISE AND LITIGATE IT HIMSELF IN THE FIRST POST-CONVICTION PROCEEDING

A. Respondent's final argument is that even if Petitioner had a "right to effective post-conviction counsel to raise ineffective-assistance-of-trial-counsel claims in his first post-conviction relief proceeding," Petitioner could not show cause because "Petitioner himself was ultimately the cause for the procedural default" -- since he could have raised those claims "directly in a pro per petition after his counsel notified the trial court that she could not find any colorable issues to raise." (BIO at 24-25). In short, Respondent argues that Petitioner defaulted any ineffective-assistance-of-counsel claims by failing to adequately represent **himself** with regard to them.

B. The most obvious problem with this argument is that one of the primary reasons for a right to appointed counsel in "first-tier" review proceedings [i.e., the first available opportunity for review] is that "indigent defendants pursuing first-tier review . . . are generally ill equipped to represent themselves." *Halbert*, 545 U.S. at 616-17, 618-22; *see also Douglas*, 372 U.S. at 357-58. Consequently, it is an absurd Catch-22 to suggest that a defendant effectively defaults his constitutional right to the assistance of first post-conviction counsel, with respect to ineffective-assistance-of-trial-counsel claims, by failing to raise and litigate such claims **without** the assistance of counsel.

C. Although Respondent cites *Coleman* in support of his Catch-22 argument (BIO at 25), *Coleman* clearly is to the contrary: **"Where a petitioner defaults a claim as a result of the denial of the right to effective assistance of counsel, the State, which is responsible for the denial as a constitutional matter, must bear the cost of any resulting default . . . ."** 501 U.S. at 754.

CONCLUSION

For the reasons stated above and in the Petition, this Court should grant the Petition.

Respectfully submitted,

ROBERT BARTELS
Counsel of Record
SANDRA DAY O'CONNOR
COLLEGE OF LAW
ARIZONA STATE UNIVERSITY
Tempe, AZ 85287-7906
(480) 965-7053
Robert.Bartels@asu.edu

Attorney for Petitioner

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

No. 10-1001

IN THE

Supreme Court of the United States

LUIS MARIANO MARTINEZ,

Petitioner,

v.

CHARLES L. RYAN, Director,
Arizona Department of Corrections,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

ROBERT BARTELS
Counsel of Record
SANDRA DAY O'CONNOR COLLEGE OF LAW
ARIZONA STATE UNIVERSITY
Tempe, AZ 85287-7906
(480) 965-7053
Robert.Bartels@asu.edu

Attorney for Petitioner

236530

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QUESTION PRESENTED

Whether a defendant in a state criminal case who is prohibited by state law from raising on direct appeal any claim of ineffective assistance of trial counsel, but who has a state-law right to raise such a claim in a first post-conviction proceeding, has a federal constitutional right to effective assistance of first post-conviction counsel specifically with respect to his ineffective-assistance-of-trial-counsel claim.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
I. State Court Proceedings	2
A. Evidence Presented at Trial	2
B. State Appellate Proceedings	4
C. State Post-Conviction Proceedings	4
1. Arizona's procedures for the adjudication of ineffective-assistance-of-counsel claims	4
2. Petitioner's truncated first post-conviction relief proceeding	6
3. Petitioner's second post-conviction relief proceeding	7

Table of Contents

Page

II. Federal Habeas Corpus Proceedings..... 9

SUMMARY OF ARGUMENT..... 11

ARGUMENT..... 14

I. Petitioner's Federal Ineffective-Assistance-Of-Trial-Counsel Claim Is Not Subject To Procedural Default, For Two Related Reasons That Turn On His Due Process/Equal Protection Right To Effective Assistance Of First Post-Conviction Counsel With Regard To That Claim..... 14

A. The Procedural Ground On Which The State Court Denied Petitioner's Federal Claim Was Not "Adequate"... 15

B. There Is Cause And Prejudice To Excuse Any Procedural Default Of Petitioner's Ineffective-Assistance-Of-Trial-Counsel Claims.. 22

II. The Court Of Appeals Misapplied This Court's Decisions In Holding That Petitioner Did Not Have A Fourteenth Amendment Right To Effective Assistance of Counsel On First-Tier Review Of His Ineffective-Assistance-Of-Trial-Counsel Claim 22

Table of Contents

Page

III. Petitioner Did Not Procedurally Default His Ineffective-Assistance-Of-Trial-Counsel Claim, Or His Right To Effective Assistance Of First Post-Conviction Counsel With Respect To That Claim, By Failing To Raise And Litigate It Himself In The First Post-Conviction Proceeding .. 37

CONCLUSION 38

TABLE OF CITED AUTHORITIES

Page

CASES:

Baldwin v. Reese,
541 U.S. 27 (2004) 20

Bonin v. Calderon,
77 F.3d 1155 (9th Cir. 1996) 28

Bonin v. Vasquez,
999 F.2d 425 (9th Cir. 1993) 28, 29

Calene v. State,
846 P.2d 679 (Wyo. 1993) 25

Coleman v. Thompson,
501 U.S. 722 (1991) ..... *passim*

Cullen v. Pinholster,
563 U.S. ___, 131 S. Ct. 1388 (2011) 20

Douglas v. California,
372 U.S. 353 (1963) ..... *passim*

Edwards v. Carpenter,
529 U.S. 446 (2000) 9

Evitts v. Lucey,
469 U.S. 387 (1985) 12, 14, 19, 31

Halbert v. Michigan,
545 U.S. 605 (2005) ..... *passim*

Cited Authorities

Page

Hoffman v. Arave,
236 F.3d 523 (9th Cir.), *cert. denied*,
534 U.S. 944 (2001) 15

Martinez v. Schriro,
623 F.3d 731 (9th Cir. 2010) ..... *passim*

Mathews v. Eldridge,
424 U.S. 319 (1976) 31

McKane v. Durston,
153 U.S. 684 (1894) 34

Reece v. Georgia,
350 U.S. 85 (1955) 15

Rice v. State,
154 P.3d 537 (Kan. App. 2007)..... 25

Ross v. Moffitt,
417 U.S. 600 (1974)..... *passim*

Smith v. Robbins,
528 U.S. 259 (2000) 29-30

State v. Johnson,
13 P.3d 175 (Utah 2000) 25

State v. Martinez,
250 P.3d 241 (Ariz. App. 2011)..... 33

Cited Authorities

Page

State v. Martinez,
(Ariz. Ct. App. Memo. Decision 2006) 6, 36

State v. Mata,
916 P.2d 1035 (Ariz. 1996) 6, 36

State v. Maturana,
882 P.2d 933 (Ariz. 1994) 4

State v. Pruett,
912 P.2d 1357 (Ariz. App. 1995)..... 33

State v. Spreitz,
39 P.3d 525 (Ariz. 2002) 4, 11, 18, 28

Staub v. City of Baxley,
355 U.S. 313 (1958) 15

Turner v. Rogers,
564 U.S. ___, 131 S. Ct. 2507 (2011) 31, 37

Wainwright v. Sykes,
433 U.S. 72 (1977) 15

CONSTITUTIONAL PROVISIONS:

U.S. Const. amend. VI ..... *passim*

U.S. Const. amend. XIV..... *passim*

Cited Authorities

Page

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2241(a) 9

28 U.S.C. § 2244(b) 13, 34

28 U.S.C. § 2244(d)(1) 35

28 U.S.C. § 2244(d)(2) 35

28 U.S.C. § 2254(a) 9, 20

28 U.S.C. § 2254(d) 20

RULES

Ariz.R.Crim.P. 31.3 25

Ariz.R.Crim.P. 32.1 33

Ariz.R.Crim.P. 32.1(a) 5, 18, 21, 28

Ariz.R.Crim.P. 32.1(e) 34

Ariz.R.Crim.P. 32.1(h) 34

Ariz.R.Crim.P. 32.2(a) 7, 9

Page

Ariz.R.Crim.P. 32.2(b) 7, 34

Ariz.R.Crim.P. 32.3 28

Ariz.R.Crim.P. 32.4(a) ..... *passim*

Ariz.R.Crim.P. 32.4(c)(2) 5, 28, 36

Ariz.R.Crim.P. 32.5 ..... 5, 6

Ariz.R.Crim.P. 32.8(d) 18

Ariz.R.Crim.P. Form 24(b) 5, 6, 36

Ariz.R.Crim.P. Form 25 5

OTHER AUTHORITIES

www.azcourts.gov/Portals/39/2010DR/SuperiorTemporary.pdf 34

OPINIONS BELOW

The panel opinion of the Ninth Circuit Court of Appeals (Pet. App. 1a-25a) is reported as *Martinez v. Schriro*, 623 F.3d 731 (9th Cir. 2010). The decisions and opinions of the Maricopa County Superior Court, the Arizona Court of Appeals, the Supreme Court of Arizona, the United States Magistrate Judge, and the United States District Court for the District of Arizona (Pet. App. 26a-85a) are unreported.

JURISDICTION

The Court of Appeals denied rehearing on November 5, 2010. Pet. App. at 84a. Petitioner filed a timely petition for a writ of certiorari on February 3, 2011. This Court granted certiorari on June 6, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

I. State Court Proceedings

A. Evidence Presented at Trial

Petitioner was charged in the state trial court with two counts of sexual conduct with a person under the age of fifteen. 623 F.3d at 733 (Pet. App. 3a). The State's theory was that Petitioner had sexual intercourse with his stepdaughter, Lacey, on two occasions during the morning of July 10, 1999. Resp. App. A11.

Lacey testified at some length at trial, but she stated that she did not remember much of what had (or had not) happened on July 10, 1999. *Id.* On cross-examination, however, Lacey testified that Petitioner did **not** try to have sex with her or "put his penis up against" her. *Id.* at A12.

Although Lacey's trial testimony did not inculpate Petitioner, the State was permitted to offer testimony that Lacey had made statements prior to trial indicating that Petitioner had rubbed her "private area" and twice had put his "private area" inside her "private area." *Id.* Defense counsel presented some evidence that Lacey had recanted her accusations against Petitioner during later pretrial conversations with several people, but he failed to present other, more persuasive evidence of such recantations. *Id.* at A12, A20-A22. Lacey's recantations were consistent with Petitioner's exculpatory statements to the police. *Id.* at A12.

The prosecution sought to explain away Lacey's recantations primarily by arguing that they were the

result of her mother's failure to support Lacey's initial accusations against Petitioner. *Id.* at A12-A13. In this regard, the prosecution relied heavily on expert testimony by a social worker, Wendy Dutton, that "a range of research" indicated that recantations by children of true accusations of sexual abuse most commonly were caused by a "lack of support from the mother of the victim." *Id.* at A13. Although defense counsel knew that Ms. Dutton would testify, he did not research the purported "scientific" basis for Ms. Dutton's opinions; and he did not seek to obtain expert testimony to refute those opinions, even though such testimony was readily available. *Id.* at A13, A17-A18.

The State presented evidence that a nightgown that Lacey was wearing when the police arrived at the Martinez residence on the morning of July 10, 1999 contained semen stains that matched Petitioner's DNA. *Id.* at A13. However, the evidence also indicated that it was not possible to determine when the semen contacted the nightgown, that semen still could be found on a garment even after it had been washed, and that the extremely low sperm count in the semen samples on the nightgown could have resulted from washing. *Id.* Moreover, and inconsistently with the State's theory, a sexual assault examination on the day of the alleged assaults did not disclose any evidence of injury or trauma on Lacey's body, including her vaginal area; and vaginal swabs collected during the same examination did not contain semen. *Id.* at A13-A14. Petitioner's trial counsel failed to uncover and present evidence that Petitioner had masturbated onto a nightgown that was in the household's dirty clothes pile prior to July 10, 1999. *Id.* at A23-A24.

Petitioner was convicted on both of the counts against him, and he was sentenced on February 19, 2002 to consecutive terms of 35 years to life. 623 F.3d at 733 (Pet. App. 3a); Resp. App. A3.

B. State Appellate Proceedings

On direct appeal, Petitioner raised issues that are not relevant to this Petition. The Arizona Court of Appeals affirmed Petitioner's convictions on March 22, 2004; and the Arizona Supreme Court denied review on September 21, 2004. *Id.* (Pet. App. at 3a); Resp. App. A6-A7.

C. State Post-Conviction Proceedings

1. Arizona's procedures for the adjudication of ineffective-assistance-of-counsel claims

At least since January 2002, the bright-line rule in Arizona has been that any ineffective-assistance-of-trial-counsel claims "raised in a direct appeal . . . will not be addressed by appellate courts regardless of merit." *State v. Spreitz*, 39 P.3d 525, 527 (Ariz. 2002).[1] Consequently, a convicted Arizona defendant must raise any ineffective-assistance claim in a post-conviction relief proceeding under Rule 32 of the Arizona Rules of Criminal Procedure, even if its merit is apparent from the appellate record. *Id.*

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1. Eight years before *Spreitz*, the Arizona Supreme Court stated that it would no longer "resolve an ineffective assistance of counsel claim on direct appeal unless the record clearly indicates that the claim is meritless." *State v. Maturana*, 882 P.2d 933, 940 (1994). Nevertheless, counsel continued to raise ineffective-assistance claims on direct appeal. *Spreitz*, 39 P.3d at 526.

A federal ineffective-assistance-of-counsel claim is authorized by Ariz.R.Crim.P. 32.1(a), which provides that it is a ground for post-conviction relief that "[t]he conviction or the sentence was in violation of the Constitution of the United States." A post-conviction relief proceeding is commenced by timely filing in the state trial court a "notice of post-conviction relief," which is a very simple form that does not require the defendant to describe any claims for relief. Ariz.R.Crim.P. 32.4(a), Form 24(b); 623 F.3d at 734 (Pet. App. 3a). A notice of post-conviction relief is timely if it is filed "within ninety days after the entry of judgment and sentence or within thirty days after the issuance of the order and mandate in the direct appeal." Ariz.R.Crim.P. 32.4(a).

The "notice" form permits the defendant to request appointed post-conviction counsel by checking a box [Form 24(b), para. 8]; and the trial court must appoint counsel for an indigent defendant "[u]pon the filing of a timely or first notice." Ariz.R.Crim.P. 32.4(c)(2). When post-conviction counsel is appointed, he or she is responsible for preparing and filing either a petition for post-conviction relief or a statement that he or she has not been able to discover any colorable claims for relief. A petition must include "every ground known to [the defendant] for vacating, reducing, correcting or otherwise changing all judgments or sentences imposed upon him or her, and certify that he or she has done so." Ariz.R.Crim.P. 32.5, Form 25.

Although an indigent defendant has a right to appointed counsel in a first post-conviction relief proceeding under Arizona Rule 32.4(c)(2), the Arizona Supreme Court has held that a defendant has no right to effective assistance of first post-conviction counsel, even with respect to a

federal ineffective-assistance-of-trial-counsel claim. *State v. Mata*, 916 P.2d 1035, 1052-53 (Ariz. 1996); *see also State v. Martinez* (Ariz. Ct. App. Memo Decision 2006) [Pet. App. 79a, 81a-82a].

2. Petitioner's truncated first post-conviction relief proceeding

In May 2002, during the pendency of Petitioner's direct appeal but without his authorization, his court-appointed appellate counsel, Harriette Levitt, filed a Notice of Post-Conviction Relief in the state trial court. 623 F.3d at 733-34 (Pet. App. 3a-4a). Consistently with the Arizona Rules of Criminal Procedure, this Notice did not state any claims for relief; but it had the effect of commencing a post-conviction relief proceeding. *Id.* at 734 (Pet. App. 3a); Ariz.R.Crim.P. 32.4(a), 32.5, Form 24(b).

There was no reason for Ms. Levitt to file the May 2002 Notice of Post-Conviction Relief before the conclusion of Petitioner's direct appeal.[2] That Ms. Levitt in fact had no such reason became apparent in February 2003, when -- without having communicated with Petitioner's trial counsel, without having otherwise investigated a possible ineffective-assistance-of-trial-counsel claim, and without Petitioner's consent -- she filed with the state trial court a statement (a) asserting that she had "reviewed the transcripts and trial file and [could] find no colorable claims pursuant to Rule 32" and (b) requesting that the court issue an order granting Petitioner 45 days to file

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2. As previously noted, a notice of post-conviction relief is timely if it is filed "within thirty days after the issuance of the order and mandate in the direct appeal." Ariz.R.Crim.P. 32.4(a).

a pro se petition for post-conviction relief. 623 F.3d at 734 (Pet. App. 4a); Resp. App. A10-A11. Ms. Levitt sent Petitioner a letter informing him that he needed to file his own petition, but the letter was written in English -- even though Petitioner had informed Ms. Levitt, in Spanish, that he did not read English and did not "understand anything of what [was] happening." Resp. Pet. A30. Petitioner did not file a pro se post-conviction relief petition, and the state trial court dismissed the pending post-conviction Notice on April 28, 2003 (more than one year before the conclusion of the direct appeal). 623 F.3d at 734 (Pet. App. 4a).

It is especially inexplicable that Ms. Levitt filed a notice of post-conviction relief but then did nothing (besides reviewing court records) to investigate a possible ineffective-assistance-of-trial-counsel claim: That type of claim is one of the few for which a first post-conviction proceeding provides first-tier review in Arizona; and Arizona's "preclusion" rules make it very difficult to obtain review of most claims that could have been raised on direct appeal -- or in a previous post-conviction relief proceeding. *See* Ariz.R.Crim.P. 32.2(a), 32.2(b); Pet. App. 79a-83a.

3. Petitioner's second post-conviction relief proceeding

With the assistance of the Arizona Justice Project, Petitioner filed a timely pro se Notice of Post-Conviction Relief in the state trial court on October 18, 2004. After that court denied Petitioner's request for appointed counsel [Pinal County Superior Court Order of December 8, 2004],

pro bono counsel associated with the Justice Project filed a timely Petition for Post-Conviction Relief. 623 F.3d at 734 (Pet. App. 4a); Resp. App. A1-A33. The Petition alleged that Petitioner's trial counsel was ineffective, in violation of the Sixth and Fourteenth Amendments to the United States Constitution, in several respects, including failing to object to Ms. Dutton's expert testimony regarding the alleged victim's recantations, even though that testimony was inadmissible under state law; failing to research the purported basis for Ms. Dutton's testimony or to present readily available and persuasive expert testimony that Ms. Dutton's testimony was inaccurate and misleading in light of the empirical literature in the field; failing to impeach an important prosecution witness concerning Lacey's pre-trial statements with his own police report; failing to discover or present additional compelling evidence that the alleged victim's initial accusations were false and her subsequent recantations true; and failing to present exculpatory evidence relating to the State's DNA evidence. 623 F.3d at 734 (Pet. App. 4a); Resp. App. A14-A27.

Petitioner also argued in the second post-conviction relief proceeding that his ineffective-trial-counsel claim was not "precluded" because he had a Fourteenth Amendment right to effective assistance of first post-conviction counsel with respect to his Sixth/Fourteenth Amendment ineffective-assistance-of-trial-counsel claim -- and because Ms. Levitt had performed ineffectively by failing to contact trial counsel, to communicate meaningfully with her Spanish-speaking client, to perform any other extra-record investigation into trial counsel's effectiveness, and to uncover the prejudicial deficiencies in trial counsel's performance outlined in the

preceding paragraph. Resp. App. A28-A30; Habeas Ex. 9 at 3-5 [USDC Dkt. #11-2 at 5-7].[3]

The state trial court dismissed the post-conviction relief petition without a hearing, finding that Petitioner's ineffective-trial-counsel claim was "precluded" from merits review, under Ariz.R.Crim.P. 32.2(a), because Ms. Levitt had not raised that claim in the aborted first post-conviction relief "proceeding" described above. 623 F.3d at 734 (Pet. App. 5a). The Arizona Court of Appeals granted review but denied relief, solely on the ground that Petitioner's claim was precluded because it could have been raised in the previous post-conviction proceeding. *Id.*; Pet. App. 81a-83a. In doing so, the Arizona Court of Appeals rejected Petitioner's argument that he had a Fourteenth Amendment right to effective assistance of first post-conviction counsel with respect to his ineffective-assistance-of-trial-counsel claim. *Id.* The Arizona Supreme Court subsequently denied review without opinion. 623 F.3d at 734 (Pet. App. 5a).

II. Federal Habeas Corpus Proceedings

Petitioner filed a Petition for a Writ of Habeas Corpus, pursuant to 28 U.S.C. §§ 2241(a) and 2254(a), on April 24, 2008. *Id.* The Petition asserted the Sixth/Fourteenth

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3. Petitioner also argued in the Arizona Court of Appeals and the Arizona Supreme Court that he had a Fourteenth Amendment right to effective assistance of first post-conviction counsel with respect to his ineffective-trial-counsel claim, but that Ms. Levitt had performed ineffectively. Resp. App. B17-B20; Habeas Ex. 10 at 5-10 [USDC Dkt. #11-2 at 22-27]. Thus, under *Edwards v. Carpenter*, 529 U.S. 446, 450-51 (2000), Petitioner exhausted the issue on which this Court has granted certiorari.

Amendment ineffective-assistance-of-trial-counsel claim described above, and it argued that the claim was not subject to procedural default because Petitioner had not received the effective assistance of first post-conviction counsel, with respect to his ineffective-trial-counsel claim, to which he was entitled under the Fourteenth Amendment. *Id.*; Habeas Pet. [USDC Dkt. #1] at 67-83, 87-94.

On December 12, 2008, the District Court issued an Order denying the Petition solely on the ground that Petitioner's claim was procedurally defaulted. 623 F.3d at 734 (Pet. App. 5a). After Petitioner filed a timely Notice of Appeal, the District Court issued a Certificate of Appealability with respect to two related issues: "1) whether Arizona's procedural bar, as applied in this case, is an adequate and independent state law ground for denying relief; [and] 2) whether Petitioner has shown cause to excuse his procedural default." *Id.*

On September 27, 2010, the Court of Appeals issued a panel opinion affirming the judgment of the District Court. 623 F.3d 731 (Pet. App. 1a). The Court of Appeals' ruling was based on its conclusion that Petitioner did not have a constitutional right to effective assistance of his first post-conviction relief counsel with regard to his federal ineffective-assistance-of-trial-counsel claim, and that the claim therefore was procedurally defaulted. 623 F.3d at 735-43 (Pet. App. 6a-25a). Petitioner's timely Petition for Panel Rehearing and Rehearing En Banc was denied on November 5, 2010. (Pet. App. 84a).

SUMMARY OF ARGUMENT

A. The Court of Appeals' dispositive ruling that Petitioner's Sixth/Fourteenth Amendment ineffective-assistance-of-trial-counsel claim was procedurally defaulted necessarily was based on the Arizona Court of Appeals' decision -- made in the context of a second state post-conviction relief proceeding -- that the claim was "precluded." That state-court decision in turn was based on the fact that Petitioner's ineffective-trial-counsel claim was not raised by Petitioner's appointed counsel in a truncated first state post-conviction relief proceeding. The Court of Appeals erred for two related, but independently sufficient, reasons: (1) The procedural ground on which the Arizona Court of Appeals denied Petitioner's claim was not "adequate" to bar federal habeas corpus review; and (2) there was cause and prejudice to excuse any default. Both of those reasons depend on the proposition that a defendant has a Fourteenth Amendment right to effective assistance of first post-conviction counsel with regard to a Sixth/Fourteenth Amendment ineffective-trial-counsel claim, when the first post-conviction proceeding provides the first opportunity to raise such a claim.

B. The first post-conviction relief proceeding in this case unquestionably was the first point at which Arizona law permitted Petitioner to raise any ineffective-assistance-of-trial-counsel claim. *State v. Spreitz*, *supra*. Moreover, Arizona courts must review such a claim on the merits when it is asserted in a timely first post-conviction relief proceeding; and a defendant pursuing "first-tier" review of such a claim -- with regard to which he necessarily has not previously received the benefit of assistance of counsel -- is especially ill equipped to represent himself.

Consequently, under *Douglas v. California*, 372 U.S. 353 (1963), and *Halbert v. Michigan*, 545 U.S. 605 (2005), Petitioner had a Fourteenth Amendment right to first post-conviction relief counsel with regard to his Sixth/Fourteenth Amendment ineffective-trial-counsel claim. And the right to counsel means the right to **effective assistance** of counsel. *Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985).

C. The foregoing analysis implicitly suggests why the Court of Appeals' attempts to distinguish *Douglas* and *Halbert* -- and to analogize this case to *Ross v. Moffitt*, 417 U.S. 600 (1974) -- are unpersuasive. Unlike the defendant in *Ross*, Petitioner had no opportunity, prior to his first post-conviction proceeding, to obtain either review of his claim or assistance of counsel with respect to that claim; and unlike the second-tier reviewing courts in *Ross*, the state trial court in Petitioner's first post-conviction proceeding had no discretion, on any basis, to decline to review the merits of any ineffective-assistance-of-trial counsel claim.

D. Contrary to the suggestion of the Court of Appeals, recognition of the right to effective assistance of first-tier review counsel with respect to ineffective-assistance-of-trial-counsel claims would not lead to an "infinite continuum" of post-conviction litigation. On a theoretical level, nothing in *Douglas* or *Halbert*, or in Petitioner's argument, would require a right to appointed/effective counsel for second-tier review; and any review of the effectiveness of first post-conviction counsel necessarily would require second-tier review of the effectiveness of trial counsel, since first post-conviction counsel's deficient performance could not result in **prejudice** unless the

underlying ineffective-trial-counsel claim was valid. Even if that was not so, as a practical matter it is unlikely in the extreme that any defendant could litigate through more than two tiers of state post-conviction review without violating existing state and federal statutes of limitation, or that many defendants would try to do so; and in any event the State would be free to simply prohibit "second or successive" post-conviction relief petitions, or to impose on such petitions restrictions similar to those imposed by 28 U.S.C. § 2244(b).

E. Because the Arizona Court of Appeals' ruling that Petitioner's federal claim was "precluded" -- without regard to whether or not first post-conviction relief counsel was effective -- frustrated the protection of Petitioner's Sixth/Fourteenth Amendment right to effective assistance of trial counsel and his Fourteenth Amendment right to effective assistance of first post-conviction counsel, it was not "adequate" to bar federal habeas corpus review. And even if the procedural ground on which the Arizona Court of Appeals based its decision was "adequate," there would be "cause and prejudice" to excuse the resulting default if it resulted from a deprivation of Petitioner's federal right to effective assistance of first post-conviction counsel with respect to his federal ineffective-trial-counsel claim. *Coleman v. Thompson*, 501 U.S. 722 (1991).

F. Because of their erroneous holdings that Petitioner had no federal constitutional right to effective assistance of first post-conviction counsel, even with respect to an ineffective-trial-counsel claim for which the first post-conviction relief proceeding provided first-tier review, the District Court and the Court of Appeals declined to address the merits of either of Petitioner's ineffective-

assistance claims. This Court therefore should reverse the judgment of the Court of Appeals and remand for a determination of those claims.

ARGUMENT

For the reasons that follow, the Court of Appeals' dispositive holding -- that Petitioner's ineffective-assistance-of-state-trial-counsel claim was subject to procedural default because Petitioner did not have a federal right to effective assistance of first post-conviction counsel with respect to that claim, even though the first post-conviction proceeding provided the first opportunity for Petitioner to raise such a claim -- was contrary to this Court's decisions in *Douglas v. California*, 372 U.S. 353 (1963), *Halbert v. Michigan*, 545 U.S. 605 (2005), and *Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985).

I. Petitioner's Federal Ineffective-Assistance-Of-Trial-Counsel Claim Is Not Subject To Procedural Default, For Two Related Reasons That Turn On His Due Process/Equal Protection Right To Effective Assistance Of First Post-Conviction Counsel With Regard To That Claim

As noted above, the state courts denied Petitioner's ineffective-assistance-of-trial-counsel claim on the procedural ground that the claim was not raised in the aborted first post-conviction "proceeding" and therefore was precluded in the second post-conviction proceeding. Petitioner of course agrees with the Court of Appeals, 623 F.3d at 735 (Pet. App. 6a-7a), that a federal habeas corpus court may not reach the merits of a claim which the state courts have denied on a procedural ground if that ground

is "adequate and independent," unless the petitioner can demonstrate "cause and prejudice to excuse his default" (or show that failure to reach the merits would "result in a fundamental miscarriage of justice"). *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977). In this case, however, there are two related reasons why Petitioner's ineffective-assistance-of-trial-counsel claim was not subject to procedural default: (A) the procedural ground on which the Arizona Court of Appeals denied Petitioner's claim was not "adequate"; and (B) there is cause and prejudice to excuse any "adequate" default.

A. The Procedural Ground On Which The State Court Denied Petitioner's Federal Claim Was Not "Adequate"

As the Court of Appeals recognized, a "state procedural rule is not adequate to bar federal review if that 'state procedural rule frustrates the exercise of a federal right.'" 623 F.3d at 742 (Pet. App. 6a) (quoting *Hoffman v. Arave*, 236 F.3d 523, 531 (9th Cir.), *cert. denied*, 534 U.S. 944 (2001)); *see also Staub v. City of Baxley*, 355 U.S. 313, 319-20 (1958); *Reece v. Georgia*, 350 U.S. 85, 88-90 (1955). As the following paragraphs will show, the state court's procedural ruling in this case -- that Petitioner's federal claims were precluded because of the failure of his first post-conviction counsel to raise them, regardless of whether or not she provided even minimally effective assistance -- was not adequate to prohibit federal-court review because it frustrated the protection of two related federal rights: (a) Petitioner's right to effective assistance of trial counsel, and (b) Petitioner's right to

effective assistance of first-tier post-conviction counsel with respect to any ineffective-trial-counsel claim.

1. The "adequacy" argument outlined above depends in part on the proposition that Petitioner, as an Arizona defendant, had a federal constitutional right to effective assistance of his **first** post-conviction counsel with respect to a claim of ineffective assistance of trial counsel. In *Coleman v. Thompson*, this Court stated the general rule that "there is no right to counsel in state collateral proceedings." 501 U.S. at 755. But this Court then recognized that there might be an exception to that general rule when "state collateral review is the first place a prisoner can present a challenge to his conviction." *Id.* The following paragraphs will demonstrate that there is such an exception, in the specific circumstances of this case, under *Douglas v. California*, 372 U.S. 353 (1963), and *Halbert v. Michigan*, 545 U.S. 605 (2005).

In *Douglas*, this Court held that under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, an indigent defendant had a right to appointed counsel in a first appeal as of right, 372 U.S. at 355-58 -- even when the appellate court already was required by state law to appoint counsel unless its independent investigation of the record indicated that "such appointment would be of no value to either the defendant or the court." *Id.* at 354-55. In so holding, this Court emphasized the "benefit of counsel's examination into the record, research of the law, and marshalling of arguments," and the unfairness of providing that benefit only to those defendants who were wealthy enough to afford it. *Id.* at 355-56, 358.

In *Ross v. Moffitt*, 417 U.S. 600, 614-18 (1974), this Court held that an indigent defendant, who had been represented by counsel on direct appeals in the state court of appeals, had no federal right to appointed counsel to pursue further review in either the state supreme court or this Court. That holding was based primarily on this Court's conclusion that after the first stage of review, the defendant would have, "at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals" -- materials that "would appear to provide the [state supreme court] with an adequate basis for its decision to grant or deny review." *Id.* at 615. And that conclusion was "fortified" by the fact that review by the state supreme court, and by this Court, was "discretionary and depend[ed] on numerous factors other than the perceived correctness" of the lower court's judgment. *Id.* at 615-17.

The defendant in *Halbert* was convicted on a plea of nolo contendere. He then requested that counsel be appointed to represent him in applying for leave to appeal, but the Michigan courts denied that request. 545 U.S. at 609. This Court, however, held that the Fourteenth Amendment required "the appointment of counsel for [Michigan] defendants, convicted on their pleas, who [sought] access to first-tier review" -- even though such review was discretionary, rather than of right. *Id.* at 610. This holding was based on this Court's conclusion that *Douglas*, rather than *Ross*, provided "the controlling instruction," 545 U.S. at 616-17; and that conclusion in turn was based on two factors that correlated to the decisive considerations in those competing precedents: (a) "in determining how to dispose of an application for

leave to appeal, Michigan's intermediate appellate court looks to the merits of the claims made in the application"; and (b) "indigent defendants pursuing first-tier review [i.e., their first available opportunity for review] in the Court of Appeals are generally ill equipped to represent themselves" (in part because they, unlike the defendant in *Ross*, had not already had the benefit of counsel's investigation, research, or briefing of relevant issues). *Id.* at 617, 618-22.

2. The holdings and rationale in *Douglas* and *Halbert* apply squarely to this case, and *Ross* therefore does not. With respect to Petitioner's ineffective-assistance-of-trial-counsel claim, the first tier of review available to him was a state post-conviction relief proceeding -- because he was not permitted to raise any such claim on appeal under Arizona law. *State v. Spreitz*, 39 P.3d 525, 527 (Ariz. 2002). Moreover, both of the factors discussed in the preceding paragraph are fully satisfied here:

a. In deciding how to dispose of an ineffective-trial-counsel claim raised in a first post-conviction relief proceeding, an Arizona trial court -- unlike the discretionary second-tier review courts in *Ross* -- must "look to the merits" (and only the merits) of the claim. Ariz.R.Crim.P. 32.1(a), 32.8(d).

b. In a first post-conviction relief proceeding, an Arizona defendant -- unlike the defendant in *Ross* -- will have received no prior assistance of counsel with regard to any ineffective-assistance-of-trial-counsel claim; and he will be at least as ill equipped as the defendants in *Douglas* and *Halbert* to represent himself in investigating and presenting such a claim.

3. To put it more succinctly, *Douglas* controls this case because in Arizona a first post-conviction relief proceeding effectively serves as the first appeal for any ineffective-assistance-of-trial-counsel claim.[4] In fact, the need for effective assistance of first-tier review counsel is even greater for ineffective-trial-counsel claims than for record-based "direct appeal" claims, because the former typically depend on non-record evidence (such as testimony by trial counsel, or by fact or expert witnesses who were not called at trial) which a first-tier reviewing court cannot uncover on its own, and which usually is impossible for a convicted -- and imprisoned -- defendant to discover and present to the reviewing court.

4. The preceding paragraphs demonstrate that an Arizona defendant pursuing his first opportunity for review of an ineffective-assistance-of-trial-counsel claim (necessarily in a Rule 32 post-conviction relief proceeding) has a Fourteenth Amendment right to appointed counsel under *Douglas* and *Halbert*. That means that such a defendant also has a due process right to effective assistance of counsel on such first-tier review. *Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985).

5. The federal habeas corpus context of this case demonstrates more concretely than *Douglas* or *Halbert* that a due process/equal protection right to counsel is especially necessary for first-tier state-court review of federal claims (such as ineffective assistance of trial

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4. And that first appeal is "direct," in the sense that -- with regard to the ineffective-trial-counsel claim -- no other proceeding intervenes between the trial and the first post-conviction relief proceeding.

counsel), even though a State is not constitutionally required to provide such review at all, *see Ross*, 417 U.S. at 606, and *Halbert*, 545 U.S. at 610:

> If a State chose not to provide even first-tier review of a federal ineffective-trial-counsel claim, the defendant would not be significantly prejudiced -- because he could raise that claim in a federal habeas corpus proceeding under 28 U.S.C. § 2254(a), without any issue of exhaustion of state remedies or procedural default. When a State does provide an opportunity for first-tier review of a federal claim, however, the defendant will not be permitted to obtain federal habeas corpus review of that claim unless he first has presented it to the state courts, as a federal claim, with considerable clarity and precision, *Baldwin v. Reese*, 541 U.S. 27, 29-33 (2004) -- and most defendants will be ill equipped to do that without the assistance of counsel.

> As noted above, the typical pro se defendant also will be ill equipped to uncover and present the evidence that is necessary to support most federal ineffective-assistance-of-trial-counsel claims in a state first-tier review proceeding; but when a state court has adjudicated a federal claim on the merits, federal habeas corpus review is limited to the record that was developed in the state court, and the state court's decision is entitled to a strong presumption of correctness. 28 U.S.C. § 2254(d); *Cullen v. Pinholster*, 563 U.S. ___, 131 S.Ct. 1388, 1398-1401 (2011). On the other hand, the limitations created by § 2254(d) would not apply if the State did not provide any review of a federal claim at all, since there would be no state-court adjudication of the claim on the merits.

Thus, a State's provision of first-tier review for a federal claim, without a right to effective assistance of counsel in presenting the claim, has a profoundly adverse, and unfair, effect on a defendant's ability to present the claim not only in the first-tier state-court proceeding itself, but also in any subsequent federal habeas corpus action. Providing first-tier review without the reasonably competent assistance of counsel effectively is a trap that makes it much more difficult for most defendants to obtain meaningful review of a federal claim in federal court.

6. When an Arizona defendant is deprived of his federal right to effective assistance of trial counsel, his first and only recourse is to file a notice of, and then a petition for, post-conviction relief, which he has a right to do under Ariz.R.Crim.P. 32.1(a). Like the defendants in *Douglas* and *Halbert*, however, a defendant is ill-equipped to litigate an ineffective-assistance-of-trial-counsel claim without the assistance of first post-conviction counsel -- and such assistance is of little use if it is not effective. Thus, the state courts' ruling that Petitioner's ineffective-trial-counsel claim was "precluded" because his first post-conviction counsel failed to raise it -- regardless of whether or not first post-conviction counsel performed effectively -- frustrated the protection of Petitioner's federal right to effective assistance of trial counsel; and it did so by denying Petitioner's federal right to effective assistance of first-tier-review counsel with respect to his ineffective-trial-counsel claim under *Douglas* and *Halbert*. The state courts' preclusion ruling therefore is not an "adequate" ground for procedural-default purposes.

B. There Is Cause And Prejudice To Excuse Any Procedural Default Of Petitioner's Ineffective-Assistance-Of-Trial-Counsel Claims

Even if the purely procedural ground for the Arizona Court of Appeals' decision in this case had been adequate and independent, there would be cause and prejudice to excuse the procedural default if Petitioner could show that first post-conviction counsel was **unconstitutionally** ineffective. *Coleman*, 501 U.S. at 753-54 ("Attorney error that constitutes ineffective assistance of counsel is cause"). Argument sections I(A)(1)-(5) have demonstrated that Petitioner did have a federal right to effective assistance of first post-conviction counsel with respect to his ineffective-trial-counsel claim. Under *Coleman*, a violation of that right constituted cause and prejudice for any procedural default of Petitioner's federal claim in the first post-conviction relief proceedings.

II. The Court Of Appeals Misapplied This Court's Decisions In Holding That Petitioner Did Not Have A Fourteenth Amendment Right To Effective Assistance of Counsel On First-Tier Review Of His Ineffective-Assistance-Of-Trial-Counsel Claim

With regard to the central issue in this case, the Court of Appeals sought to distinguish *Douglas* and *Halbert*, and to analogize this case to *Ross*, on several grounds. 623 F.3d at 739-43 (Pet. App. 16a-23a); see also BIO at 8-15. As the following paragraphs will show, the Court of Appeals' reasoning regarding *Douglas*, *Halbert*, and *Ross* does not withstand analysis.

A. The Court of Appeals' first attempt to distinguish *Douglas* and *Halbert* asserted that

> Martinez has already received direct review of his conviction and received the assistance of counsel in connection with that appeal. . . . Even if collateral review presents the first tier of review for Martinez' ineffective assistance of [trial] counsel claim, we conclude that Martinez' action is not analogous to a direct appeal -- or the first opportunity for him to obtain review of his conviction -- so as to entitle him to effective counsel.

623 F.3d at 740 [Pet. App. 18a]; see also BIO at 9-10. But this effort to argue that Petitioner's first post-conviction proceeding did not constitute first-tier review is neither consistent with *Douglas* and *Halbert* nor supported by *Ross*:

As the above-quoted passage from the Court of Appeals' opinion recognizes, the fact that Petitioner was **prohibited** from raising his ineffective-assistance-of-trial-counsel claim in his "direct appeal" from his conviction meant that the first post-conviction proceeding was "the first tier of review" for that claim; and with respect to that claim, Petitioner unquestionably had not "already received the assistance of counsel in connection with that first appeal." Thus, for Petitioner's trial-counsel claim the first post-conviction proceeding fully implicated the "first tier" due process and equal protection concerns that underlay *Douglas* and *Halbert*.

The foregoing implicitly suggests how clearly *Ross* is distinguishable from this case. In *Ross*, the discretionary review proceedings in which the defendant sought appointed counsel necessarily were restricted to claims that he already had litigated in the state court of appeals -- with appointed counsel. 417 U.S. at 603-604. Thus, those discretionary review proceedings provided second (or third) tier review for all of the *Ross* defendant's claims; and he -- unlike Petitioner -- really **had** "already received the assistance of counsel" for those claims.[5]

The Court of Appeals' position regarding "first tier" review would mean that the State could deprive a defendant of his right to effective assistance of counsel with respect to first-tier review of any federal constitutional claim simply by (i) restricting direct "appeal" to state-law errors and (ii) requiring all federal errors to be raised by means of a subsequent "post-conviction" petition. Such a label-driven result would defy common sense; and it would not be consistent with the holdings in *Douglas* and *Halbert*, or with this Court's explicit statement in *Halbert* that the right to counsel on first-tier review is not dependent on whether such review is labeled an "appeal." 545 U.S. at 619.

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5. In *Douglas*, this Court noted that it was not concerned with the right to counsel "for the preparation of a petition for discretionary or mandatory review beyond the stage in the appellate process at which the claims have once been presented by a lawyer and passed upon by an appellate court." 372 U.S. at 356 (emphasis added). And in *Ross*, this Court stated that the State had a duty "only to assure [that an] indigent defendant [had] an adequate opportunity to present his claims fairly in the context of the State's appellate process." 417 U.S. at 616 (emphasis added).

The Court of Appeals' flawed reasoning also implies that if an Arizona defendant filed a notice and petition for post-conviction relief alleging ineffective assistance of trial counsel **before** he filed a notice of direct appeal [as he could under Ariz.R.Crim.P. 31.3 and 32.4(a)], he would be entitled to effective assistance of counsel in the post-conviction proceedings -- but not with respect to any issues that had to be raised on direct appeal. Such a result would make no sense in terms of the holdings in *Douglas* and *Halbert* (and *Ross*).[6]

B. In attempting to analogize this case to *Ross*, the Court of Appeals stated that

> Martinez faces a lesser handicap in pursuing collateral review than a defendant pursuing

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6. In some States, a convicted defendant may (or must) raise any ineffective-assistance-of-trial-counsel claim on direct appeal; but when the merit of such a claim depends on evidence not in the appellate record, the defendant may move for a remand to the trial court for an evidentiary hearing to supplement the record -- after which the ineffective-trial-counsel claim returns to the appellate court, with the entire remand-and-return procedure being regarded as part and parcel of the original "direct appeal." *See, e.g., Rice v. State*, 154 P.3d 537, 539-42 (Kan. App. 2007); *State v. Johnson*, 13 P.3d 175, 178 (Utah 2000); *Calene v. State*, 846 P.2d 679, 683-84, 692 (Wyo. 1993). The Court of Appeals' opinion in this case would mean that a defendant in the system described above would have a Fourteenth Amendment right to effective assistance of first "direct appeal" counsel in remand proceedings in the trial court with regard to an ineffective-trial-counsel claim. But for purposes of the right to counsel for first-tier review, there is no reason to distinguish such a remand-and-return procedure from Arizona's "post-conviction relief" procedure simply because the former is labeled as part of the "direct appeal."

> a first appeal, as in *Douglas* and *Halbert*. Martinez has already received the assistance of appellate counsel in a prior proceeding, like the petitioner in *Ross*.
>
> . . . . A defendant seeking second-tier review will have received the assistance of counsel in connection with direct review, and would have "at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case."

623 F.3d at 741 (Pet. App. at 19a) (quoting *Ross*, 417 U.S. at 615); see also BIO at 11. These statements would make sense when the "collateral" proceeding in question -- like the second-tier review proceedings at issue in *Ross* -- involved the same claims as a prior counseled direct appeal. However, they do not apply at all to the first post-conviction proceeding in this case:

1. The "assistance of appellate counsel" that Petitioner received "in a prior proceeding" could not have had anything to do with any ineffective-trial-counsel claim, since Arizona law prohibited such claims on direct appeal. Similarly, neither the "brief on his behalf in the [Arizona] Court of Appeals" nor any "opinion by the [Arizona] Court of Appeals" on direct appeal could have addressed any claim that trial counsel was ineffective.

2. A "transcript or other record of trial proceedings" would be inadequate to evaluate the effectiveness of trial counsel, which often depends on what trial counsel did

(or did not do) outside the record. And with respect to such extra-record factors, a convicted (and imprisoned) defendant obviously is especially ill equipped to represent himself.

C. In seeking to distinguish this case from *Douglas* and *Halbert*, the Court of Appeals pointed out that both of those cases involved review proceedings in which the reviewing courts looked to the merits of the defendants' claims in performing a "gatekeeping" function. 623 F.3d at 741 (Pet. App. 20a). But in both *Douglas* and *Halbert*, this Court's point was that **even though** the reviewing courts were performing a gatekeeping function, they looked to the merits in doing so. 372 U.S. at 354-57; 545 U.S. at 612, 617-19. The fact that an Arizona trial court presented with an ineffective-trial-counsel claim in a first post-conviction proceeding has no gatekeeping function, and must address the merits directly, makes *Douglas* even more clearly controlling in this case than it was in *Halbert*.

The preceding point effectively demonstrates why it is not relevant that

> discretionary appeal to a state Supreme Court or to the United States Supreme Court is not intended to correct error in individual cases, but rather to address questions of public importance, critical issues of law, conflicts in the decisions of relevant courts, and so forth.

623 F.3d at 741 (Pet. App. 21a). In a first post-conviction proceeding, an Arizona trial court has no discretion whether to rule on an ineffective-assistance claim based on considerations of public importance (or anything else);

and contrary to the Court of Appeals' suggestion, *id.* at 742 (Pet. App. at 21a), with respect to such claims the Arizona trial courts do perform an "error correction function" that is precisely "analogous to an appellate court hearing a criminal defendant's direct appeal as of right." *State v. Spreitz*, 39 P.3d at 526; Ariz.R.Crim.P. 32.1(a), 32.4(c)(2).[7]

D. The Court of Appeals' discussion of Petitioner's argument for a very specific "exception to the general rule that there is no right to counsel in collateral review" concludes with the assertion that "this exception would swallow the general rule." 623 F.3d at 742 (Pet. App. at 23a). While this statement is cryptic, it is supported by a citation to *Bonin v. Calderon*, 77 F.3d 1155, 1160 (9th Cir. 1996) -- which in turn cites to *Bonin v. Vasquez*, 999 F.2d 425 (9th Cir. 1993), in which the Court of Appeals offered the following explanation:

> The actual impact of such an exception would be the likelihood of an infinite continuum of litigation in many criminal cases. If a petitioner has a Sixth Amendment right to competent counsel in his or her first state postconviction proceeding because that is the first forum in which the ineffectiveness of trial counsel can be alleged, it follows that the petitioner has a Sixth Amendment right to counsel in the second state

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7. In the Arizona context, the Court of Appeals also was incorrect in asserting that post-conviction relief "is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature," 623 F.3d at 742 (Pet. App. 21a): Rule 32.3 of the Arizona Rules of Criminal Procedure specifically provides that a post-conviction relief proceeding "is part of the original criminal action and not a separate action."

> postconviction proceeding, for that is the first forum in which he or she can raise a challenge based on counsel's performance in the first state postconviction proceeding. Furthermore, because the petitioner's first federal habeas petition will present the first opportunity to raise the ineffective assistance of counsel in the second state post-conviction proceeding, it follows logically that the petitioner has a Sixth Amendment right to counsel in the first federal habeas proceeding as well. And so it would go. Because any Sixth Amendment violation constitutes cause, . . . federal courts would never be able to avoid reaching the merits of any ineffective-assistance claim, regardless of the nature of the proceeding in which counsel's competence is alleged to have been defective. As a result, the "exception" would swallow the rule.

Id. at 430; see also BIO at 13. Although the Court of Appeals' concern about the likelihood of an "infinite continuum of litigation" is understandable in the abstract, it is misplaced in this case, for both theoretical and pragmatic reasons.

1. On a theoretical level: A second post-conviction proceeding in which a defendant asserts that first post-conviction counsel was ineffective with respect to an ineffective-assistance-of-trial-counsel claim obviously will provide the first opportunity for the defendant to obtain review of the adequacy of first post-conviction counsel's performance. But first post-conviction counsel could not be ineffective, under *Smith v. Robbins*, 528 U.S. 259,

285-86 (2000), unless his or her deficient performance resulted in **prejudice**; and there could be no prejudice unless the defendant's ineffective-trial-counsel claim was valid. Thus, if the defendant is to prevail in the second post-conviction proceeding, that proceeding inherently will require **second**-tier review of the underlying ineffective-trial-counsel claim -- since the first opportunity for review of that claim was provided by the first post-conviction proceeding. *Douglas* and *Halbert* therefore would not require the appointment of counsel for the second post-conviction proceeding, and the supposedly "infinite continuum" of constitutionally required counsel would end after one tier of review (in Arizona, the first post-conviction relief proceeding).[8]

In the generalized example discussed above, the defendant might argue that because he did not receive constitutionally adequate "benefit of counsel" in the first post-conviction proceeding, he should have a constitutional right to effective appointed counsel in the second post-conviction proceeding. Although this argument would have some appeal in cases (like this one) in which first post-conviction counsel failed to raise any effective-trial-counsel claim, *Ross* did not indicate that its holding regarding second-tier review was limited to cases in which first-tier-review counsel was constitutionally effective.

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8. This does not mean that a defendant (like Petitioner) could not challenge the effectiveness of first post-conviction counsel by means of a second post-conviction proceeding (if state law permitted such a proceeding); it just means that the defendant would have no federal right to counsel in the second post-conviction proceeding (or in any subsequent federal habeas proceeding).

Moreover, *Ross* made it clear that "a State can, consistently with the Fourteenth Amendment, provide for differences [between indigent and non-indigent defendants] so long as the result does not amount to a denial of due process or an 'invidious discrimination,'" 417 U.S. at 608 (quoting *Douglas*, 372 U.S. at 356-57), and that "[t]he question is not one of absolutes, but one of degrees," 417 U.S. at 612. In determining whether procedural protections satisfy due process requirements, an important factor is "the risk of an erroneous deprivation of [a private interest] through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976); *see also Turner v. Rogers*, 564 U.S. ___, 131 S.Ct. 2507, 2517-19 (2011). At the outset of any **second** post-conviction proceeding (which is when the right to appointed counsel for that proceeding becomes pertinent), the risk that both trial counsel **and** first post-conviction counsel actually were ineffective will be exponentially lower than the ab initio risk, at the first post-conviction stage, that just trial counsel actually was ineffective. It therefore would be reasonable to conclude that fundamental fairness did not require the State to provide appointed counsel, in any second or subsequent post-conviction relief proceeding, for the purpose of investigating the effectiveness of all prior counsel.[9]

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9. In *Douglas*, *Evitts*, and *Halbert*, this Court already has determined that if a criminal defendant was not represented on first-tier review of claims of error relating to his conviction, the risk (and costs) of an erroneous determination would be sufficiently great that the defendant has a Due Process right to effective assistance of counsel on such review. But none of those precedents means that the same is true on second-tier review, and *Ross* suggests the contrary.

In any event, whether or not an "infinite continuum of litigation" would be theoretically possible is not an important consideration in this case, given the practicalities discussed below.

2. Even if successive post-conviction proceedings -- each of which claimed that all previous post-conviction counsel had been ineffective with regard to an ineffective-assistance-of-trial-counsel claim -- theoretically would all amount to first-tier review for purposes of *Douglas* and *Halbert*, it is unlikely in the extreme that any defendant could work his way through more than two tiers of state post-conviction review without running afoul of state and federal statutes of limitation, or that many defendants would even try to do so:

As previously noted, in Arizona a non-capital defendant convicted after a trial must commence any post-conviction relief proceeding by filing a "notice" of post-conviction relief "within ninety days after the entry of judgment and sentence or within thirty days after the issuance of the order and mandate in the direct appeal." Ariz.R.Crim.P. 32.4(a).[10] Not surprisingly, a notice of post-conviction relief usually is filed (if at all) after the conclusion of direct appeal. In such a typical case, it is virtually inconceivable that the defendant could commence and litigate a first post-conviction relief proceeding, and then commence even a second post-conviction proceeding

10. Rule 32.4(a) provides that "[a]ny notice not timely filed may only raise claims pursuant to Rule 32.1(d), (e), (f), (g), or (h)." Since a claim of ineffective assistance of counsel is authorized only by Rule 32.1(a) ["[t]he conviction was in violation of the Constitution of the United States or of the State of Arizona"], the Arizona Rules do not permit such a claim to be untimely.

(to challenge the effectiveness of first post-conviction counsel with respect to an ineffective-trial counsel claim), within thirty days after the order and mandate in the direct appeal.

Even in the less usual case (like this one) in which a first post-conviction proceeding is commenced and concluded during the pendency of direct appeal, it is highly improbable that the defendant could commence and litigate a second post-conviction proceeding, and then file a **third** notice of post-conviction relief, within thirty days after the order and mandate in the direct appeal.[11]

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11. If this Court holds that Arizona defendants have a federal constitutional right to effective assistance of first post-conviction counsel with respect to ineffective-assistance-of-trial-counsel claims, one would hope and expect that Arizona will amend the above-described time limit for the commencement of a second post-conviction proceeding to challenge the effectiveness of first post-conviction counsel. But such an amendment could, and probably would, mirror the existing time limit for a second notice of post-conviction relief in the one situation in which Arizona already recognizes a federal constitutional right to effective assistance of counsel in a first post-conviction proceeding: a challenge to a guilty or no-contest plea (or certain probation violations). *State v. Martinez*, 250 P.3d 241 (Ariz. App. 2011); *State v. Pruett*, 912 P.2d 1357, 1360 (Ariz. App. 1995). With respect to such a challenge -- which Ariz.R.Crim.P. 32.1 somewhat strangely labels an "of-right" proceeding -- Ariz.R.Crim.P. 32.4(a) provides that any second notice of post-conviction relief must be filed "within thirty days after the issuance of the final order or mandate by the appellate court in the petitioner's first petition for post-conviction relief proceeding." (Emphasis added). That time limit would be difficult to meet for a second post-conviction notice, and virtually impossible for a third notice.

Quite apart from the time-limitation pragmatics discussed above, it is unrealistic to think that many convicted defendants would be able to find a succession of attorneys willing to allege that all previous trial and post-conviction counsel were ineffective; and most defendants would be ill equipped to fashion, file, and litigate multiple successive ineffective-assistance-of-all-counsel petitions on their own. No doubt some especially determined and vexatious defendants could **attempt** to achieve an "infinite continuum" of ineffective-assistance litigation. But the same already is true in Arizona with regard to such cognizable claims as newly discovered evidence [Ariz.R.Crim.P. 32.1(e)] and actual innocence [Ariz.R.Crim.P. 32.1(h)] -- both of which are explicitly exempted from "preclusion" by Ariz.R.Crim.P. 32.2(b).[12]

3. While the foregoing discussion of practical limitations on any theoretical "infinite continuum of litigation" has focused on Arizona's post-conviction relief system, any State would be free to implement such a system. Moreover, any State would be free, under *McKane v. Durston*, 153 U.S. 684, 687 (1894), to simply prohibit all second or successive post-conviction relief petitions -- or to restrict such petitions in the same manner as 28 U.S.C. § 2244(b).

4. From the federal habeas corpus perspective: Even if a potential habeas petitioner somehow could complete several tiers of state post-conviction review, it is highly

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12. Nevertheless, the total number of new post-conviction relief filings in Arizona in 2010 (1,746) was quite small, especially in comparison to the number of criminal cases in which defendants were sentenced in 2009 (48,961) [or in 2008 (48,543)]. http://www.azcourts.gov/Portals/39/2010DR/SuperiorTemporary.pdf, pp. 3-4.

unlikely that he could do so without exceeding the one-year statute of limitation prescribed by 28 U.S.C. § 2244(d)(1). This is so even though § 2244(d)(2) provides that the one-year period is tolled while a timely-initiated state post-conviction relief proceeding is pending: Section 2244(d)(2) would be pertinent only to the extent that, at the end of each and every stage of the "continuum," the defendant very quickly could find new counsel to present to the state courts some new ineffective-trial-counsel claim; and it is unrealistic to suppose that this would happen often.

5. Even if there was a likelihood that there would be some state post-conviction or federal habeas cases involving multi-level ineffective-assistance claims, that would not justify denying the constitutional right to first-tier-review counsel recognized in *Douglas* and *Halbert*. In effect, the Court of Appeals' decision means that a state criminal defendant has an abstract right to effective assistance of trial counsel -- but that if he is deprived of that right, he has no federal right to an effective remedy.

E. In light of the foregoing not-quite-infinite discussion of Respondent's forward-looking "infinite continuum of litigation" argument, it may be useful to note that recognition of the right to effective assistance of first post-conviction counsel with respect to any ineffective-trial-counsel claim would not require Arizona to automatically appoint first post-conviction counsel for every indigent convicted defendant:

Arizona law currently requires the trial court to appoint counsel for any indigent defendant who (i) files a "timely or first" notice of post-conviction relief on a very simple, non-substantive form and (ii) indicates (by

checking a box on the form) that he wants appointed counsel. Ariz.R.Crim.P. 32.4(c)(2), Form 24(b).[18] There is no reason to think that the relatively small number of convicted Arizona defendants who have taken advantage of their right to obtain appointed post-conviction counsel by simply filing a Form 24(b) notice of post-conviction relief would be increased significantly (if at all) by this Court's recognition of a constitutional right to effective assistance of first post-conviction counsel with respect to ineffective-trial-counsel claims -- especially when it is highly likely that most Arizona defendants already would expect (albeit incorrectly, under current Arizona law) that appointed post-conviction counsel were legally required to perform with some minimally reasonable competence.

Moreover, nothing in Petitioner's position in this case suggests that Arizona must provide every convicted defendant with appointed counsel before he decides whether he wishes to request appointed post-conviction counsel -- to assist him to determine what claims, if any, he may have -- by filing Form 24(b). That decision does not require specialized legal knowledge or skill of the sort that is required to determine and litigate whether trial counsel was constitutionally effective. As long as the State provides adequate "substitute procedural safeguards" -- such as reasonable notice of the defendant's right to request appointed post-conviction counsel if he is indigent, and of the deadline and the simple means for doing so

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13. As previously noted, however, the Arizona courts have held that there is no requirement that first post-conviction counsel mandatorily appointed under Rule 32.4(c)(2) must be effective, even with respect to first-tier review of ineffective-assistance-of-trial-counsel claims. *State v. Mata*, 916 P.2d 1035, 1052-53 (Ariz. 1996); *State v. Martinez* (Ariz. Ct. App. Memo Decision 2006), Pet. App. 79a, 81a-82a.

[such as Form 24(b)] -- neither *Douglas* nor *Halbert* would require the State also to provide counsel to help the defendant decide whether to exercise that right. *See also Turner v. Rogers*, 131 S.Ct. at 2518-19 (2011).

III. Petitioner Did Not Procedurally Default His Ineffective-Assistance-Of-Trial-Counsel Claim, Or His Right To Effective Assistance Of First Post-Conviction Counsel With Respect To That Claim, By Failing To Raise And Litigate It Himself In The First Post-Conviction Proceeding

The final argument in Respondent's Brief in Opposition was that even if Petitioner had a "right to effective post-conviction counsel to raise ineffective-assistance-of-trial-counsel claims in his first post-conviction relief proceeding," Petitioner could not show cause because Petitioner himself could have raised those claims "directly in a **pro per** petition after his counsel notified the trial court that she could not find any colorable issues to raise." (BIO at 24-25). In short, Respondent has argued that Petitioner defaulted his ineffective-assistance-of-counsel claims by failing to adequately represent **himself** with regard to them.

The most obvious problem with the argument described above is that one of the primary reasons for a right to appointed counsel in first-tier review proceedings is that "indigent defendants pursuing first-tier review . . . are generally ill equipped to represent themselves." *Halbert*, 545 U.S. at 616-17, 618-22; *see also Douglas*, 372 U.S. at 357-58. Consequently, it is an absurd Catch-22 to suggest that a defendant effectively defaults his Fourteenth Amendment right to effective assistance of first post-conviction counsel, especially with respect to

Sixth/Fourteenth Amendment ineffective-trial-counsel claims, by failing to raise and litigate such claims **without** the assistance of counsel.

Although the Brief in Opposition cited *Coleman* in support of the argument described above (BIO at 25), *Coleman* clearly is to the contrary: "Where a petitioner defaults a claim as a result of the denial of the right to effective assistance of counsel, the State, which is responsible for the denial as a constitutional matter, must bear the cost of any resulting default . . . ." 501 U.S. at 754.

CONCLUSION

Like the Petition for Certiorari, this brief has not addressed the merits of Petitioner's ineffective-assistance-of-trial-counsel and ineffective-assistance-of-first-post-conviction-counsel claims, because neither the Court of Appeals nor the District Court did so. This Court therefore should reverse the judgment of the Court of Appeals and remand with direction to require the District Court to consider the merits of Petitioner's ineffective-assistance claims.

Respectfully submitted,

ROBERT BARTELS
Counsel of Record
SANDRA DAY O'CONNOR COLLEGE OF LAW
ARIZONA STATE UNIVERSITY
Tempe, AZ 85287-7906
(480) 965-7053
Robert.Bartels@asu.edu

Attorney for Petitioner

RESPONDENT'S BRIEF

No. 10-1001

In The Supreme Court of the United States

LUIS MARIANO MARTINEZ,

Petitioner,

vs.

CHARLES L. RYAN, Director,
Arizona Department of Corrections,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF ON THE MERITS

THOMAS C. HORNE
Attorney General

DAVID R. COLE
Solicitor General

KENT E. CATTANI
Chief Counsel
Criminal Appeals/Capital
Litigation Division

MICHAEL T. O'TOOLE
Assistant Attorney General
(*Counsel of Record*)
1275 W. Washington
Phoenix, Arizona 85007-2997
Telephone: (602) 542-4686
Kent.Cattani@azag.gov
Michael.OToole@azag.gov

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

In *Pennsylvania v. Finley*, 481 U.S. 551 (1987), this Court held that the right to counsel does not apply to state collateral proceedings and, thus, there is no right to the effective assistance of collateral-review counsel. As a matter of state law, Arizona provides criminal defendants with counsel to challenge their convictions and sentences in state collateral proceedings following the conclusion of direct appeal. Does this state procedure create a federal constitutional right to the effective assistance of collateral-review counsel?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	5
ARGUMENT	9
I. THERE IS NO CONSTITUTIONAL RIGHT TO COLLATERAL-REVIEW COUNSEL	11
II. ANY RIGHT TO COUNSEL IN A COLLATERAL PROCEEDING DOES NOT INCLUDE THE CONSTITUTIONAL RIGHT TO "EFFECTIVE" ASSISTANCE OF COUNSEL	24
III. TREATING INEFFECTIVENESS OF COLLATERAL-REVIEW COUNSEL AS "CAUSE" TO OVERCOME A PROCEDURAL DEFAULT WOULD DEFEAT CONGRESS'S INTENT IN ENACTING AEDPA	32
IV. *TEAGUE* PREVENTS MARTINEZ FROM ESTABLISHING "CAUSE" BASED ON ANY NEWLY-RECOGNIZED RIGHT TO COLLATERAL-REVIEW COUNSEL	36
CONCLUSION	42

TABLE OF AUTHORITIES

Page

CASES

Anders v. California, 386 U.S. 738 (1967) 14

Arizona v. Rumsey, 467 U.S. 203 (1984) 16

Beard v. Banks, 542 U.S. 406 (2004) 39

Bond v. United States, 131 S. Ct. 2355 (2011) 23

Bonin v. Vasquez, 999 F.2d 425 (9th Cir. 1993) 31

Brecht v. Abrahamson, 507 U.S. 619 (1993) 17, 18

Butler v. McKellar, 494 U.S. 407 (1990) 38

Canion v. Cole, 115 P.3d 1261 (Ariz. 2005) 25

Caspari v. Bohlen, 510 U.S. 383 (1994) 37, 38

Coleman v. Thompson, 501 U.S. 722 (1991) 10, 12, 16, 17

Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458 (1981) 26

Cullen v. Pinholster, ___ U.S. ___, 131 S. Ct. 1388 (2011) 35

Delia v. City of Rialto, 621 F.3d 1069 (9th Cir. 2010) 37

District Attorney's Office for Third Judicial Dist. v. Osborne, ___ U.S. ___, 129 S. Ct. 2308 (2009) 23, 24, 25, 27, 29

Douglas v. California, 372 U.S. 353 (1963) 6, 11, 12, 13, 27

Dretke v. Haley, 541 U.S. 386 (2004) 33

Edwards v. Carpenter, 529 U.S. 446 (2000) 9, 40, 41

TABLE OF AUTHORITIES – Continued

Page

Ellis v. Armenakis, 222 F.3d 627 (9th Cir. 2000).....37

Evitts v. Lucey, 469 U.S. 387 (1985).....12, 27, 28

Felker v. Turpin, 518 U.S. 651 (1996).....36

Gilmore v. Taylor, 508 U.S. 333 (1993).....40

Goeke v. Branch, 514 U.S. 115 (1995).....39

Halbert v. Michigan, 543 U.S. 605 (2005) 6, 17, 39

Harrington v. Richter, ___ U.S. ___, 131 S. Ct. 770 (2011).....19

Harris v. United States, 536 U.S. 545 (2002) 16

Herrera v. Collins, 506 U.S. 390 (1993).....18, 27

Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415 (1994).....25

Lawrence v. Florida, 549 U.S. 327 (2007).....38

Martinez v. Schriro, 623 F.3d 731 (9th Cir. 2010).....4, 5

Massaro v. United States, 538 U.S. 500 (2003).....7, 18, 19, 21, 22

McKane v. Durston, 153 U.S. 684 (1894).....11

Miller v. French, 530 U.S. 327 (2000).....36

Murray v. Carrier, 477 U.S. 478 (1986).....10

Murray v. Giarratano, 492 U.S. 1 (1989).....*passim*

Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998).....28

Pennsylvania v. Finley, 481 U.S. 551 (1987).....*passim*

TABLE OF AUTHORITIES – Continued

Page

Post v. Bradshaw, 422 F.3d 419 (6th Cir. 2005)....33, 34

Ross v. Moffitt, 417 U.S. 600 (1974).... 11, 13, 14, 18, 27

Schiro v. Farley, 510 U.S. 222 (1994) 37

Schriro v. Summerlin, 542 U.S. 348 (2004).....38

Simmons v. Kapture, 516 F.3d 450 (6th Cir. 2008) 39

Skinner v. Switzer, 562 U.S. ___, 131 S. Ct. 1289 (2011) 25

Sossamon v. Texas, ___ U.S. ___, 131 S. Ct. 1651 (2011) 33

Spears v. Mullin, 343 F.3d 1215 (10th Cir. 2003) 33

State v. Cuffle, 828 P.2d 773 (Ariz. 1992) 20

State v. Henderson, 115 P.3d 601 (Ariz. 2005).....23

State v. Spreitz, 39 P.3d 525 (Ariz. 2002).....22

Strickland v. Washington, 466 U.S. 668 (1984) 19, 28

Swarthout v. Cooke, 562 U.S. ___, 131 S. Ct. 859 (2011) 26, 27

Teague v. Lane, 489 U.S. 288 (1989) .....*passim*

United States v. Cronic, 466 U.S. 648 (1984) 29

United States ex rel. Easley v. Hinsley, 305 F. Supp. 2d 867 (N.D. Ill. 2004) 33

Wainwright v. Sykes, 433 U.S. 72 (1977).....29

Whelchel v. Bazzle, 489 F. Supp. 2d 523 (D.S.C. 2006) 33

Woodford v. Garceau, 538 U.S. 202 (2003) 34

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. amend VI 1, 32

U.S. Const. amend X 1, 23

U.S. Const. amend XIV 1, 13, 32

STATUTES

28 U.S.C. § 2254 ..... 2, 9, 36

28 U.S.C. § 2254(d) 35

28 U.S.C. § 2254(d)(1) 1, 40, 41

28 U.S.C. § 2254(i) 1, 8, 33, 34, 35

28 U.S.C. § 2255 21

RULES

Ariz. R. Crim. P. 32.1(e) 20

Ariz. R. Crim. P. 32.1(g) 20

Ariz. R. Crim. P. 32.1(h) 25, 31

Ariz. R. Crim. P. 32.2 3

Ariz. R. Crim. P. 32.2(a)(3) 3, 16

Ariz. R. Crim. P. 32.9 ..... 25, 30

Ariz. R. Crim. P. 32.9(c) 30

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Hoffman & King, Rethinking the Federal Role in State Criminal Justice, 84 N.Y.U. L. REV. 791 (2009) 35

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The Tenth Amendment to the United States Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Fourteenth Amendment to the United States Constitution provides that no State shall "deprive any person of life, liberty, or property, without due-process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. § 2254(d)(1) mandates that habeas relief "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

28 U.S.C. § 2254(i) mandates that "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not

be a ground for relief in a proceeding arising under section 2254."

STATEMENT OF THE CASE

In August of 2001, jurors in Pinal County, Arizona, convicted Petitioner Luis Martinez of two counts of sexual conduct with a person under the age of 15. (Pet. App. at 38a.) The victim was Martinez's 11-year-old step-daughter, who reported the conduct to several individuals, including her mother, a police officer, and a social worker. (*Id.* at 38a; Resp. App. at A11-A12.) DNA testing established that semen on the victim's nightgown came from Martinez. (Resp. App. at A13.)

Prior to and during trial, the victim recanted her allegations that Martinez had sexually abused her. (Resp. App. at A11-A13.) Nevertheless, a jury convicted Martinez after considering the DNA evidence described above and the victim's previous statements incriminating him. (*Id.* at A10-A14.) Martinez was sentenced to consecutive terms of life imprisonment with no possibility of parole for 35 years. (*Id.* at A10.)

Newly-appointed counsel represented Martinez on direct appeal. During the pendency of the appeal, counsel initiated a post-conviction-relief proceeding on Martinez's behalf. (Pet. App. at 3a.) Counsel subsequently filed a notice indicating she could not find any colorable issues to raise in a petition for post-conviction relief. (*Id.* at 4a.) On April 28, 2003,

the trial court dismissed the post-conviction-relief proceeding after the time for Martinez to file his own petition expired. (*Id.*)

On February 7, 2005, Martinez, through new counsel, filed a petition for post-conviction relief, asserting that his trial counsel was ineffective. (Resp. App. at A1-A27.) Martinez also argued that his original post-conviction attorney was ineffective, and, thus, his claims were not procedurally barred under Rule 32.2 of the Arizona Rules of Criminal Procedure.[1] (*Id.* at A27-A32.)

The Pinal County Superior Court denied the petition, concluding that the claims were precluded under Rule 32.2, and, alternatively, that the claims failed on the merits. (Pet. App. at 68a-78a.) The Arizona Court of Appeals granted review of Martinez's case, but denied relief on the basis that the claims were precluded, without reaching the merits of the claims. (*Id.* at 79a-83a.) The Arizona Supreme Court denied review without comment. (*Id.* at 5a.)

On April 24, 2008, Martinez filed a petition for writ of habeas corpus in the United States District Court claiming: (1) his trial counsel was ineffective; and (2) his ineffective-assistance-of-trial-counsel claims were not subject to procedural default. (*Id.* at 42a-46a.) The Magistrate Judge issued a report and

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[1] Ariz. R. Crim. P. 32.2(a)(3) provides that claims that could have been raised in "any previous collateral proceeding" are precluded.

recommendation, recommending that the petition be denied because: (1) Martinez's ineffective-assistance-of-trial-counsel claims were procedurally defaulted; (2) the state-court finding of preclusion was an adequate and independent ground for denying relief; (3) Martinez could not establish "cause" to excuse the default by asserting that his post-conviction counsel was ineffective; (4) Martinez did not establish "a fundamental miscarriage of justice," and (5) his ineffective-assistance-of-trial-counsel claims failed on the merits. (*Id.* at 46a-67a.) On December 12, 2008, the District Court concluded that it would be inappropriate to deny Martinez's claims on the merits because Respondent (hereinafter "the State") had filed an answer limited to procedural default. (*Id.* at 35a-36a.) The court adopted the report and recommendation in all other respects. (*Id.* at 26a-36a.)

On September 27, 2010, the Court of Appeals affirmed the judgment of the District Court, concluding that "there is no federal constitutional right to the assistance of counsel in connection with state collateral relief proceedings, even where those proceedings constitute the first tier of review for an ineffective assistance of counsel claim." *Martinez v. Schriro*, 623 F.3d 731, 739-40 (9th Cir. 2010). The court further held that because there is no such right: (1) the state-court finding of preclusion was an adequate and independent ground for denying relief; and (2) Martinez could not allege the ineffective assistance of post-conviction-relief counsel as "cause" to excuse the

procedural default of his ineffective-assistance-of-trial-counsel claims. *Id.* at 742-43. On November 5, 2010, the court denied Martinez's request for rehearing and rehearing en banc. (Pet. App. at 84a-85a.)

SUMMARY OF ARGUMENT

The Court of Appeals correctly found that Martinez procedurally defaulted his ineffective-assistance-of-trial-counsel claims because: (1) the state procedural ground denying post-conviction-relief was adequate to bar federal habeas review; and (2) Martinez did not establish "cause" to overcome the procedural default. Martinez's arguments to the contrary are premised on the same unsustainable proposition, *i.e.*, that a state criminal defendant has the right to the effective assistance of counsel in collateral-review proceedings.

This Court has categorically held that there is no constitutional right to counsel in collateral-review proceedings. *Pennsylvania v. Finley*, 481 U.S. 551, 554-59 (1987). This Court has adhered to that rule, even in capital cases. *Murray v. Giarratano*, 492 U.S. 1, 7-15 (1989).

Noticeably absent from Martinez's opening brief is any reference to *Finley* and *Giarratano*, which address procedural facts similar to those at issue here. Martinez ostensibly seeks an exception to the rule in *Finley* and *Giarratano* for claims that must be raised for the first time in a state collateral proceeding.

However, collateral proceedings in Arizona (and in other states) are generally limited to claims that could not have been pursued in a previous proceeding. Accordingly, Martinez is essentially asking this Court to overrule *Finley* and *Giarratano*. He has not, however, provided a compelling reason for doing so.

In alleging a right to counsel in state post-conviction proceedings, Martinez improvidently relies on *Douglas v. California*, 372 U.S. 353 (1963), and *Halbert v. Michigan*, 543 U.S. 605 (2005). *Douglas* holds that there is a right to counsel on direct appeal, 372 U.S. at 355-58; *Halbert* holds that the right to counsel applies to discretionary review in post-conviction appellate proceedings involving defendants who pled guilty and thus waived their right to a direct appeal. A key rationale for both of those decisions, however, was that the proceedings at issue were the first and perhaps only review of the defendant's convictions and sentences. *Halbert*, 545 U.S. at 607; *Douglas*, 372 U.S. at 357. That rationale does not apply to defendants like Martinez, whose convictions and sentences have already been reviewed on direct appeal.

Martinez urges this Court to find that the right to counsel is claim specific and should extend not only to proceedings that provide the first review of a conviction and sentence, but also to proceedings that provide the first review of a particular claim. Martinez argues that, because Arizona requires that ineffective-assistance-of-counsel claims be raised in post-conviction proceedings and not on direct appeal,

the right to counsel should extend beyond direct appeal and include post-conviction proceedings.

Recognizing a right to counsel in collateral proceedings that provide the first opportunity to raise a particular claim would be a monumental change in this Court's jurisprudence and would impose substantial costs on the states. Under Martinez's theory, counsel would be required not only to raise ineffective-assistance claims, but also to raise claims involving "newly-discovered evidence" and other claims cognizable in collateral-review proceedings.

Holding that there is a right to *effective* assistance of post-conviction counsel would be an even more monumental change that would exponentially increase costs to the states. Recognizing a right to effective assistance of post-conviction counsel would require at least one more round of state court proceedings—this time to provide an opportunity for defendants to present claims that their initial collateral-review counsel was ineffective. This would be an unwarranted expansion of this Court's holdings and would substantially interfere with the States' interest in the finality of their criminal convictions.

The fact that Arizona requires that ineffective-assistance claims be raised in collateral proceedings does not change the analysis. This Court has recognized that a collateral, post-conviction proceeding is the appropriate forum for raising ineffective-assistance claims. *See Massaro v. United States*, 538

U.S. 500, 504-05 (2003). Arizona's framework for addressing ineffective-assistance claims is consistent with this Court's view that such claims are best considered in the context of collateral review.

Arizona has not shifted claims that are traditionally part of direct review to post-conviction proceedings. Instead, record-based claims typically considered on direct review of a defendant's conviction and sentence remain part of the direct appeal. Non-record-based claims that have traditionally been raised in collateral proceedings remain the focus of those proceedings.

Even assuming a right to the assistance of counsel in state collateral-review proceedings, this Court should not recognize "ineffectiveness" of such counsel as "cause" to overcome a procedural default in a federal habeas proceeding, because doing so would, *inter alia*, eviscerate congressional intent in enacting the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under AEDPA, "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." 28 U.S.C. § 2254(i). Allowing claims of ineffective assistance of collateral-review counsel to constitute "cause" to overcome a procedural default would improperly permit an end run around section 2254(i).

Furthermore, Congress, by enacting AEDPA, evidenced a clear intent to reduce delay in federal

habeas proceedings. Allowing relief by using ineffective-assistance-of-collateral-review counsel as "cause" to excuse a procedural default would contravene this purpose and would result in consideration of unexhausted claims untethered to a state court decision. Such a result would be contrary to principles of comity and finality underlying AEDPA.

Finally, because the Court is addressing this issue in the context of collateral review, application of any new rule creating a right to the effective assistance of post-conviction-review counsel would have only prospective application to cases that are not yet final on direct review. *See Teague v. Lane*, 489 U.S. 288, 305-11 (1989). *Teague* precludes relief in this case because a petitioner seeking to use a claim of ineffective assistance of post-conviction counsel as cause to overcome a procedural default in a federal habeas proceeding must separately exhaust the ineffectiveness claim in state court. *Edwards v. Carpenter*, 529 U.S. 446, 450-52 (2000). Here, Martinez presented the claim to the Arizona courts, which properly denied it under *Finley* and *Giarratano*. Rejecting the Arizona courts' holding on this issue based on a new rule overruling *Finley* and *Giarratano* would be improper under *Teague*.

ARGUMENT

Federal courts reviewing a petition for a writ of habeas corpus under 28 U.S.C. § 2254 "will not review

a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). Here, the state courts rejected Martinez's claims of ineffective assistance of trial counsel on procedural grounds because he did not raise the claims in his first state post-conviction proceeding.[2]

Where a habeas petitioner has defaulted his federal claims in state court, the federal courts may not review the petition "unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. To establish cause for a procedural default, a petitioner must show that the default was due to an "objective factor" that was "external" to him and could not "fairly be attributed to him." *Id.* at 753; *see also Murray v. Carrier*, 477 U.S. 478, 488 (1986) (petitioner must show that "some

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[2] As noted previously, the state trial court also rejected Martinez's underlying claim of ineffective assistance of trial counsel on the merits. The federal Magistrate Judge reviewing Martinez's federal habeas petition similarly rejected the claim on the merits. Accordingly, the Amicus Brief submitted by Former State Supreme Court Justices misstates the record by suggesting that "no state or federal court has reviewed the merits of Martinez's claim." (Amicus Brief of Former State Supreme Court Justices, at 5.)

objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule").

Martinez asserts that ineffective assistance of post-conviction counsel constitutes "cause" sufficient to overcome his procedural default in not raising his claims in his initial post-conviction proceeding. Martinez's argument fails because: (1) there is no constitutional right to post-conviction counsel; (2) even assuming a right to counsel, there is no right to the "effective" assistance of such counsel; (3) AEDPA specifically provides that ineffective assistance of post-conviction counsel shall not provide a basis for relief on federal collateral review; and (4) finding a right to effective assistance of post-conviction counsel would be a new rule that may not be applied retroactively to cases already final on direct appeal.

I. THERE IS NO CONSTITUTIONAL RIGHT TO COLLATERAL-REVIEW COUNSEL.

The Federal Constitution does not require the States to provide appellate review of criminal convictions. *McKane v. Durston*, 153 U.S. 684, 687-88 (1894). Nevertheless, this Court has concluded that equal protection and due process require the appointment of counsel to indigent defendants if the State provides an appeal process. *Douglas*, 372 U.S. at 356-57. The right to counsel under this theory, however, has not been extended past a first appeal of right, *Ross v. Moffitt*, 417 U.S. 600, 614-19 (1974),

and this Court has specifically held that there is no right to counsel in collateral-review proceedings. *Finley*, 481 U.S. at 559; *see also Coleman*, 501 U.S. at 752; *Giarratano*, 492 U.S. at 7-15.

In *Douglas*, this Court recognized the right of an indigent criminal defendant to the assistance of counsel in his first appeal of right in state court. 372 U.S. at 355-56; *see also Evitts v. Lucey*, 469 U.S. 387, 396 (1985). The petitioners in *Douglas* were two indigent defendants who had been jointly tried and convicted in California. 372 U.S. at 353-54. They requested, but were denied, the assistance of counsel on appeal. Under California's procedural rules, the type of appeal available to a criminal defendant hinged upon whether he could afford counsel. If he could not, his case was subjected to *ex parte* review on the merits without benefit of any argument by counsel. *Id.* at 355-56. The appellate court would "prejudge the merits" before determining whether counsel should be provided. *Id.* at 356. In contrast, criminal defendants who could afford counsel were not faced with a preliminary "*ex parte* examination of the record," but had their arguments presented to the court in fully briefed form. *Id.*

Douglas concluded that this was not a fair procedure: "When an indigent is forced to run this ga[u]ntlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure." *Id.* at 357. The California procedure denied equal protection to the poor because the "merits of the one and only appeal an indigent has as of right are decided without

benefit of counsel," resulting in an unconstitutional line drawn between rich and poor. *Id.*

In *Ross*, however, this Court declined to extend the right to counsel beyond a defendant's first appeal of right. 417 U.S. at 617-18. The *Ross* petitioners sought appointment of counsel for a second-tier discretionary appeal to the state supreme court and for certiorari review to this Court. This Court ruled that counsel need not be appointed for those proceedings.

This Court rejected the *Ross* petitioners' due-process argument, noting that "there are significant differences between the trial and appellate stages of a criminal proceeding." *Id.* at 610. The purpose of trial "is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt," while in the appellate process, a defendant seeks "not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or a jury below." *Id.* This difference is significant because, while a State may not dispense with the trial stage without a defendant's consent, the State "need not provide any appeal at all." *Id.* at 611. Because of these differences, this Court reasoned, the question at issue was more "profitably considered under an equal protection analysis." *Id.*

This Court also rejected the *Ross* petitioners' equal-protection argument, noting that the Fourteenth Amendment "does not require absolute equality or precisely equal advantages." *Id.* at 612.

The State has no duty to duplicate "the legal arsenal that may be privately retained by a criminal defendant . . . but only to assure [that an] indigent defendant [had] an adequate opportunity to present his claims fairly in the context of the State's appellate process." *Id.* at 616. Thus, an indigent defendant was not denied meaningful access to the state supreme court simply because counsel was not appointed. This Court further noted that at the stage of a "second-tier" appeal, the criminal defendant would have already received the assistance of counsel in connection with his first appeal. *Id.* at 615. Counsel's work, supplemented by a defendant's own submissions, would provide the state court with an adequate basis for its decision to grant or deny review. *Id.*

In *Finley*, this Court ruled categorically that the right to counsel does not apply to collateral-review proceedings. 481 U.S. at 555. Following direct appeal, the trial court appointed counsel to represent the defendant in post-conviction-relief proceedings. Counsel concluded, however, that there were no arguable bases for relief. Accordingly, he advised the trial court in writing of his conclusion and requested permission to withdraw. The trial court agreed that there were no arguably meritorious issues and dismissed the petition for post-conviction relief.

The defendant acquired new appointed counsel and appealed that ruling. The state appellate court concluded that counsel's conduct violated the defendant's constitutional rights because counsel did not comply with the requirement of *Anders v. California*,

386 U.S. 738, 744 (1967), that direct appeal counsel who fails to find meritorious issues identify "arguable" issues and provide the defendant an opportunity to file his own brief.

This Court reversed the state court, ruling that "since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori*, he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process." *Finley*, 481 U.S. at 555. The Court found that the considerations underlying the decision not to apply the right to counsel to discretionary review "apply with even more force to postconviction review." *Id.* at 556. This is because "[p]ostconviction relief is even further removed from the criminal trial than is discretionary direct review." *Id.* Furthermore "States have no obligation to provide this avenue of relief," and when they do, neither the fundamental fairness mandated by the Due Process Clause nor the equal-protection guarantee are implicated. *Id.* Finally, this Court stated:

> At bottom, the decision below rests on a premise that we are unwilling to accept—that when a State chooses to offer help to those seeking relief from convictions, the Federal Constitution dictates the exact form such assistance must assume. On the contrary, in this area States have substantial discretion to develop and implement programs to aid prisoners seeking to secure post-conviction review.

Id. at 559; *see also Giarratano*, 492 U.S. at 7-15 (applying *Finley* to capital cases).

Martinez does not mention *Finley* and *Giarratano* in his opening brief notwithstanding the obvious relevance these cases have to the issue he raises. Martinez is ostensibly seeking an exception to the rule announced in *Finley* and *Giarratano* for claims that can only be raised for the first time in a state collateral proceeding. However, collateral proceedings in Arizona (and in other states) are generally limited to claims that could not have been pursued in a previous proceeding. *See* Ariz. R. Crim. P. 32.2(a)(3) (precluding post-conviction relief on any ground "[t]hat has been waived at trial, on appeal, or in any previous collateral proceeding"). Accordingly, Martinez is essentially asking this Court to overrule *Finley* and *Giarratano*. He has not, however, provided a "special justification" for this court to overrule this precedent. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984); *see also Harris v. United States*, 536 U.S. 545, 556-57 (2002) (plurality opinion) (noting that *stare decisis* is not an "inexorable command," but the doctrine is "of fundamental importance to the rule of law") (citations and internal quotation marks omitted).

In *Coleman*, 501 U.S. at 755, this Court was asked to make an exception to the *Finley* rule "in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction." This Court declined to entertain the suggestion because the issue before it was the effectiveness of counsel appealing from the collateral proceeding and

not the effectiveness of collateral-review counsel. *Id.* In *Giarratano*, however, the Court had previously concluded that there was no right to counsel in collateral proceedings, notwithstanding the dissent's protest that such proceedings are generally the first opportunity for the defendant to raise a claim of ineffective assistance of trial or appellate counsel. *See* 492 U.S. at 24 (Stevens, J., joined by Brennan, J., Marshall, J., and Blackmun, J., dissenting).

This Court's more recent decision in *Halbert*, on which Martinez heavily relies, is consistent with *Finley*, *Giarratano*, and *Coleman* and does not portend the new rule Martinez seeks. In *Halbert*, this Court extended the right to counsel to discretionary appeals involving defendants who had pled guilty and who had thus waived their right to a direct appeal. This Court noted that, in cases involving a guilty plea, the state court of appeals' discretionary review at issue "provides the first, and likely the only, direct review the defendant's conviction and sentence will receive." 543 U.S. at 619. Thus, unlike the instant case, review of an application for leave to appeal under those circumstances "rank[ed] as a first-tier appellate proceeding requiring the appointment of counsel under *Douglas*." *Id.* at 609.

This Court has attached great significance to the difference between direct and collateral review. For example, in *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993), the Court stated that "[d]irect review is the principal avenue for challenging a conviction." This

Court further noted that "[t]he principle that collateral review is different from direct review resounds throughout our habeas jurisprudence." *Id.*

The conclusion of direct review renders a conviction "final" and no longer subject to "new rules" announced thereafter. *Teague*, 489 U.S. at 311; *see also id.* ("Typically, it should be the case that any conviction free from federal constitutional error at the time it became final, will be found, upon reflection, to have been fundamentally fair and conducted under those procedures essential to the substance of a full hearing.") (quoting *Mackey v. United States*, 401 U.S. 667, 693-94 (1971) (Harlan J., concurring in judgments and dissenting in part)); *Herrera v. Collins*, 506 U.S. 390, 399 (1993) ("Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears."); *Ross*, 417 U.S. at 610-11 (noting that after conviction, a defendant will not be using an attorney "as a shield to protect him against being 'haled into court' by the State and stripped of his presumption of innocence," he will be using the attorney "as a sword to upset the prior determination of guilt"). Thus, there is a significant distinction between direct and collateral review. *Cf. Finley*, 481 U.S. at 559 (stating that a defendant in a post-conviction-relief proceeding is in a "fundamentally different position" than a defendant who is on trial or pursuing a first appeal as of right).

Ineffective-assistance-of-trial-counsel claims are properly viewed as being collateral to the conviction

and sentence because they do not seek to upset a verdict or sentence by showing error in the record; they seek reversal by attempting to litigate the litigation of the trial. *Cf. Strickland v. Washington*, 466 U.S. 668, 689-90 (1984) (noting that collateral review of ineffective-assistance claims sometimes becomes an "intrusive post-trial inquiry" of trial counsel's performance that can result in "a second trial, this one of counsel's unsuccessful defense") (citation and internal quotation marks omitted). Unlike a record-based direct review, collateral proceedings provide a forum for developing facts that were not presented at trial. The post-conviction court may take testimony from witnesses for the defendant and the prosecution, and the trial court makes factual and credibility determinations based on the evidence before it. *See Massaro*, 538 U.S. at 506.

Additionally, collateral claims of ineffective assistance of counsel differ from record-based claims raised on direct appeal because they reflect a defendant's second chance to raise—using ineffective assistance of counsel as a conduit—issues that could have been pursued at trial. *See Harrington v. Richter*, ___ U.S. ___, 131 S. Ct. 770, 788 (2011) (noting that ineffective-assistance claims "can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial"). Moreover, a defendant raising a claim of ineffective assistance of counsel necessarily waives the attorney-client privilege, and counsel alleged to have been ineffective can be called

on to explain his or her conduct. *See State v. Cuffle*, 828 P.2d 773, 775-76 (Ariz. 1992).

The significant differences between collateral and direct review warrant the categorical distinction this Court has drawn in *Finley* and *Giarratano* regarding appointment of counsel in collateral proceedings. Once a conviction is final, attempts to "re-litigate" the litigation come at significant cost to the criminal-justice system, and those costs would expand significantly if appointment of counsel is required every time a "new" issue is raised in a collateral proceeding.

Accepting Martinez's proposed rule would require appointment of counsel not only to raise ineffective-assistance claims on collateral review, but every other "new" claim, including, for example, claims asserting newly-discovered evidence that "probably would have changed the verdict or sentence," or a "significant change in the law" applicable to a petitioner whose convictions and sentences are final on direct review. *See* Ariz. R. Crim. P. 32.1(e), (g). Thus, Martinez's proposed rule would overrule *Finley* and *Giarratano* and would represent a sea change in this Court's jurisprudence regarding the right to counsel.

Martinez's argument that Arizona's procedures for raising ineffective-assistance claims mandates a departure from *Finley's* categorical rule is unpersuasive. The fact that Arizona requires that ineffective-assistance claims be raised in collateral proceedings is neither surprising nor unusual, as evidenced by this Court's recognition that a post-conviction

proceeding is the appropriate forum for litigating the collateral issue of trial counsel's performance.

In *Massaro*, in rejecting an assertion that ineffective-assistance-of-counsel claims are procedurally barred when not raised on direct appeal, this Court noted that "[r]ules of procedure should be designed to induce litigants to present their contentions to the right tribunal at the right time." 538 U.S. at 504 (quoting *Guinan v. United States*, 6 F.3d 468, 474 (7th Cir. 1993)). The "right tribunal at the right time" for raising ineffective-assistance claims is generally a collateral proceeding in the trial court:

> In light of the way our system has developed, in most cases a motion brought under Section 2255 is preferable to direct appeal for deciding claims of ineffective assistance.[3] When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose. . . .
>
> Under the rule we adopt today, ineffective-assistance claims ordinarily will be litigated in the first instance in the [trial] court, the forum best suited to developing the facts

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[3] This provision (28 U.S.C. § 2255) provides a mechanism for post-trial collateral review for federal prisoners.

> necessary to determining the adequacy of representation during an entire trial.

Massaro, 538 U.S. at 505-06.

Although leaving open the possibility that an ineffective-assistance claim could be raised on direct appeal, this Court made clear in *Massaro* that "few such claims will be capable of resolution on direct appeal and thus few will benefit from earlier resolution." *Id.* at 507. This Court in fact noted that it would be a "rare" instance in which a defendant would benefit from earlier resolution of an ineffective-assistance claim. *Id.*

In 2002, the Arizona Supreme Court ruled that ineffective-assistance claims would not be considered on direct appeal. *See State v. Spreitz*, 39 P.3d 525, 527 (Ariz. 2002). Like this Court in *Massaro*, the Arizona Supreme Court noted that "[t]he trial court is the most appropriate forum" for raising ineffective-assistance claims. *Id.* at 526. The court then reiterated that such claims "are to be brought in Rule 32 [post-conviction] proceedings" in the trial court in the first instance to avoid a possible preclusion of remedies for the defendant if the claims were pursued in a piecemeal manner. *Id.* at 527.

Arizona's framework for addressing ineffective-assistance claims is entirely consistent with *Massaro's* pronouncement that such claims are best considered in the context of collateral review commenced in the trial court. Arizona has not shifted claims that are traditionally part of direct review to

post-conviction proceedings. Instead, record-based claims that are traditionally considered on direct appeal of a defendant's conviction and sentence remain part of the direct appeal. Collateral review is reserved for non-record-based claims that are more properly asserted in a forum where the record can be developed.[4]

This Court "exercises[s] the utmost care" when it is asked to impose a new constitutional requirement on the States' criminal-justice systems. *District Attorney's Office for Third Judicial Dist. v. Osborne*, ___ U.S. ___, 129 S.Ct. 2308, 2322 (2009) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)). This is because the "judicial imposition of a categorical [rule] . . . might pretermit other responsible solutions being considered in Congress and state legislatures." *Osborne*, 129 S. Ct. at 2322 (quoting *Giarratano*, 492 U.S. at 14 (Kennedy, J., joined by O'Connor, J., concurring in judgment)). Further, principles of federalism—as expressed in the Tenth Amendment—dictate deference to the States in these matters. *See Bond v. United States*, 131 S. Ct. 2355, 2366 (2011) ("Impermissible interference with state sovereignty is not

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[4] Although an Arizona defendant technically cannot allege a claim of ineffective counsel on direct appeal, any "record-based" claim underlying the ineffective-assistance claim can be reviewed on direct appeal under Arizona's fundamental error review standard. *See State v. Henderson*, 115 P.3d 601, 607, ¶¶ 19-20 (Ariz. 2005) (holding that a defendant may prevail based on an unobjected-to error if he can show that the error was fundamental and prejudicial).

within the enumerated powers of the National Government, and action that exceeds the National Government's enumerated powers undermines the sovereign interests of States.") (internal citation omitted). This Court should decline Martinez's invitation to impose on the states a requirement that counsel be appointed in all collateral proceedings in which a "new" issue is raised.

II. ANY RIGHT TO COUNSEL IN A COLLATERAL PROCEEDING DOES NOT INCLUDE THE CONSTITUTIONAL RIGHT TO "EFFECTIVE" ASSISTANCE OF COUNSEL.

Martinez's assertion of a right to effective assistance of collateral-review counsel fails under a due-process analysis.[5] Because there is no substantive right to collateral post-conviction-relief proceedings, any contention that a state post-conviction-review process violates due-process must be based on a claim of "procedural due process." *See Osborne*, 129 S. Ct. at 2316-23 (concluding that because convicted prisoner did not have a substantive right to DNA testing, his claim that he was denied access to testing necessarily involved a claim of procedural due process).

Given the wide discretion states are accorded in enacting post-conviction-review legislation, a procedural due-process challenge in this context faces a

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[5] Martinez's claim is necessarily based on due process, rather than equal protection, because the state provided counsel to represent Martinez in his collateral proceeding.

formidable hurdle.[6] *See Finley*, 481 U.S. at 559 (rejecting the contention that "when a State chooses to offer help to those seeking relief from [their] convictions, the Federal Constitution dictates the exact form such assistance must assume"). As a result of this deference to the States in these matters, "[f]ederal courts may upset a State's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided." *Osborne*, 129 S. Ct. at 2320; *see also Skinner v. Switzer*, 562 U.S. ___, 131 S. Ct. 1289, 1293 (2011) (stating that the Court's analysis in *Osborne* "left slim room for the prisoner to show that the governing state [post-conviction procedure] denies him procedural due process").

The procedures Arizona follows in collateral post-conviction-relief proceedings—which include the appointment of counsel, the right to discovery, *see Canion v. Cole*, 115 P.3d 1261, 1263 (Ariz. 2005), an opportunity to seek further review, *see* Ariz. R. Crim. P. 32.9, and unlimited opportunities to assert actual innocence, *see* Ariz. R. Crim. P. 32.1(h)—exceed any possible constitutional requirements for post-conviction review. *See Osborne*, 129 S. Ct. at 2320

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[6] In other contexts, this Court has viewed procedural due process claims in light of the process provided at common law. *See Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 430 (1994) (collecting cases). Under this view, Martinez's claim is unavailing because there is no common law right to appeal, let alone a right to collateral-review proceedings.

("We see nothing inadequate about the procedures Alaska has provided to vindicate its state right to postconviction-relief in general, and nothing inadequate about how those procedures apply to those who seek access to DNA evidence."); *Giarratano*, 492 U.S. at 14-15 (Kennedy, J., and O'Connor, J., concurring) (concluding that due process was satisfied where capital defendants had access to prison's "institutional lawyers" to assist them in preparing their post-conviction-relief petitions); *Finley*, 481 U.S. at 559 (holding that state-court procedures for providing prisoners access to post-conviction review were constitutionally adequate).

Moreover, when determining whether there is a violation of procedural due process, a federal court looks at the procedures in general and not whether, in the court's opinion, the procedures produced a fair result. *See, e.g., Swarthout v. Cooke*, 562 U.S. ___, 131 S. Ct. 859, 862 (2011) (stating that where parolees received the procedures they were constitutionally entitled to, "[t]hat should have been the beginning and the end of the federal habeas courts' inquiry into whether [they] received due process"); *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 467 (1981) ("We hold that the power vested in the Connecticut Board of Pardons [under state law] to commute sentences conferred no rights on respondents beyond the right to seek commutation."). Instead, once it is established that the required procedures were followed, any error in the proceedings would be a "mere error of state law," "not a denial of due process."

Cooke, 131 S. Ct. at 863 (quoting *Engle v. Isaac*, 456 U.S. 107, 121 n.21 (1982)).

Martinez does not allege that, as a general matter, attorneys appointed to represent Arizona defendants in collateral-review proceedings are not competent to do so. Thus, he has not established that Arizona's collateral-review procedures were "fundamentally inadequate to vindicate [his] substantive right[ ]" to seek review of any ineffective-assistance-of-trial-counsel claims. *Osborne*, 129 S. Ct. at 2320. *Cf. Herrera*, 506 U.S. at 399 (rejecting the contention that due process requires "that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person" because "[t]o conclude otherwise would all but paralyze our system for enforcement of the criminal law") (internal citation and quotation marks omitted).

Martinez has essentially argued that, under *Evitts*, any constitutional right to counsel automatically entitles him to the right to effective assistance of counsel. However, this Court has cautioned against declaring rights "absolute to their logical extreme." *Ross*, 417 U.S. at 612; *see also Douglas*, 372 U.S. at 357 ("lines can be and are drawn. . . .").

In *Finley*, which was decided after *Evitts*, the Court expressly held that—even if due process required the appointment of counsel in a state habeas proceeding—it did not require the "effective" assistance of counsel; instead, the Court concluded there was no due-process violation where the state prisoner

received "exactly that which she is entitled to receive under state law—an independent review of the record by competent counsel."[7] 481 U.S. at 558; *see also Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 284 (1998) (rejecting contention that *Evitts* created "a new 'strand' of due process analysis," and noting that other decisions of the Court "make clear that there is no continuum requiring varying levels of process at every conceivable phase of the criminal system").

Here, Martinez received an independent review of the record by appointed counsel. Although he refers to his post-conviction proceeding as "truncated" (Opening Brief at 11) and "aborted" (*id.* at 14), that proceeding was no more "truncated" or "aborted" than the proceeding upheld in *Finley*. The fact that his post-conviction counsel found no meritorious issues (a conclusion the state trial court and the Magistrate Judge agreed with in rejecting Martinez's ineffective-assistance claims on the merits) does not mean that Martinez was denied due process.

As noted previously, this Court has cautioned against allowing "intrusive post-trial inquiry" of a trial counsel's performance, which can result in "a second trial, this one of counsel's unsuccessful defense." *Strickland*, 466 U.S. at 689-90. Accepting

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[7] Because *Finley* rejects the contention that the state prisoner had the right to "effective" assistance of post-conviction counsel, the reference to "competent counsel" necessarily meant competence as a general matter, *e.g.*, an attorney licensed to practice in law who is competent in a particular field.

Martinez's position and allowing the alleged ineffectiveness of collateral counsel to establish cause for the procedural default of ineffective-assistance-of-trial-counsel claims would require yet *another* layer of collateral-review proceedings in state court, this one to allow the defendant to exhaust his claim that collateral-review counsel was ineffective. Accepting Martinez's position, therefore, would improperly shift the focus further from the initial trial and would amount to a "third trial," this one to litigate the relitigation of the litigation. *See Wainwright v. Sykes*, 433 U.S. 72, 90 (1977) (recognizing that "the state trial on the merits [should be] the 'main event,' so to speak, rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing").

Also, this Court has also cautioned against attaching "familiar preconviction trial rights" to state collateral-review proceedings. *Osborne*, 129 S. Ct. at 2319. The Sixth Amendment right to effective assistance of counsel is a preconviction right designed to ensure the accused receives "a fair trial." *United States v. Cronic*, 466 U.S. 648, 658 (1984). It is not a necessary component of a state-created procedure. *See Finley*, 481 U.S. at 558.

Further, the States' interest in the finality of their criminal convictions would be significantly compromised if this Court were to recognize a right to the effective assistance of counsel in collateral-review proceedings. As noted previously, recognizing such a right would mean that the claim would have to be litigated in a second collateral proceeding, not only

when claims of ineffective assistance of trial counsel are raised, but also when any other "new" claim is raised for the first time in collateral proceedings.

Martinez attempts to limit the effect of the rule he seeks by agreeing that he is not entitled to counsel in a second collateral-review proceeding.[8] (Cert. Reply Brief, at 7.) This concession, however, demonstrates the fallacy of his argument. If, as Martinez contends, a defendant is incapable of raising an ineffective-assistance-of-trial-counsel claim without the assistance of counsel, it would be unreasonable to expect him to challenge the effectiveness of collateral-review counsel in a second collateral proceeding without counsel, particularly because an allegation that collateral-review counsel was ineffective necessarily requires a showing that trial counsel was ineffective. Thus, consistent with Martinez's assertion that the appointment of counsel is necessary to a "meaningful" collateral proceeding, counsel would have to be appointed in a second or subsequent successive

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[8] Martinez asserts he is not entitled to counsel for a second collateral-review proceeding under the fiction that a second collateral-review proceeding would be a "**second**-tier review of the underlying trial-counsel claim. . . ." (Cert. Reply Brief, at 7.) This is incorrect. Under Arizona law, the second-tier review of a post-conviction-relief proceeding is commenced by filing a petition for review in the Arizona appellate courts. Ariz. R. Crim. P. 32.9(c). A challenge to the effectiveness of collateral-review counsel, on the other hand, would constitute a new proceeding with yet another opportunity to petition for review from any adverse decision.

collateral proceeding as well.[9] *See Bonin v. Vasquez*, 999 F.2d 425, 429 (9th Cir. 1993) (noting that recognizing a right to effective assistance of counsel in a first post-conviction-relief proceeding to raise claims that trial counsel was ineffective would logically result in "an infinite continuum of litigation in many criminal cases").

The new rule Martinez proposes would come at great cost to the criminal-justice system, with little chance of any positive return. In Arizona, the new rule would not measurably increase the likelihood of an innocent defendant obtaining relief, because claims of actual innocence can already be raised at any time and are never precluded in collateral proceedings. *See* Ariz. R. Crim. P. 32.1(h). Moreover, the likelihood of obtaining relief based on ineffective assistance would obviously decrease with each round of collateral review, because such relief would be premised on the assumption that each prior attorney

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[9] Conversely, if Martinez's concession that he would not be entitled to counsel in a second collateral proceeding is accepted at face value, his claim is effectively moot. This is because Martinez had the opportunity to file his own petition after his appointed counsel filed a notice that she could not find any colorable claims to raise. (Pet. App. at 82a ["Because Martinez was granted leave to file a pro se petition for post-conviction relief in his first proceeding, he could have raised a claim then that trial counsel had been ineffective."].) For all practical purposes, this opportunity served the same function as allowing Martinez to challenge his collateral-review counsel's performance in a second post-conviction-relief proceeding.

failed to raise a winning claim. Finally, in the instant case, Martinez faces the additional hurdle of having already had two reviewing courts reject his ineffective-assistance-of-trial-counsel claim on the merits.

In sum, assuming *arguendo* Martinez had a right to counsel in his collateral-review proceeding to raise ineffective-assistance-of-trial-counsel claims, that right was a state-created right that did not entail the further right to the "constitutionally effective assistance of counsel" under either the Sixth or Fourteenth Amendments. This Court should decline Martinez's invitation to create a new procedural due-process right that would dramatically alter the criminal-justice system. More "process" further removed from the trial would be unlikely to measurably improve the system and would require the expenditure of resources that could be better employed in proceedings more closely related to the "main event."

III. TREATING INEFFECTIVENESS OF COLLATERAL-REVIEW COUNSEL AS "CAUSE" TO OVERCOME A PROCEDURAL DEFAULT WOULD DEFEAT CONGRESS'S INTENT IN ENACTING AEDPA.

AEDPA provides that "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a [federal habeas proceeding]." 28 U.S.C. § 2254(i). Martinez seeks to evade § 2254(i) by claiming he is only asserting the ineffectiveness of

collateral-review counsel as cause to excuse his procedural default of his underlying claims. (Reply Brief, at 9.) However, as several lower courts have concluded, "[t]he language of this statute is clear," and "[i]t expressly bars relief grounded on claims of incompetent or ineffective counsel in federal post-conviction proceedings." *Post v. Bradshaw*, 422 F.3d 419, 423 (6th Cir. 2005). "And it bars 'relief,' not simply particular kinds of relief . . . ." *Id.*; *see also Spears v. Mullin*, 343 F.3d 1215, 1255 (10th Cir. 2003) (citing § 2254(i) for the proposition that "ineffective representation in state post-conviction proceedings is inadequate to excuse a procedural default"); *Whelchel v. Bazzle*, 489 F. Supp. 2d 523, 537 (D.S.C. 2006) ("[The habeas petitioner] attempts to establish 'cause' due to the ineffective assistance of [collateral review] counsel, but § 2254(i) prevents such a claim."); *United States ex rel. Easley v. Hinsley*, 305 F. Supp. 2d 867, 879 (N.D. Ill. 2004) (concluding that § 2254(i) precluded habeas petitioner from alleging his post-conviction counsel's performance as cause).

The word "relief" includes "equitable" relief. *See Sossamon v. Texas*, ___ U.S. ___, 131 S. Ct. 1651, 1660 (2011) (noting that "relief" is defined as "[t]he redress or benefit, esp. equitable in nature . . . , that a party asks of a court") (quoting Black's Law Dictionary 1295 (7th ed. 1999)). A finding of cause and prejudice is an equitable ground for excusing a procedurally-defaulted claim. *See Dretke v. Haley*, 541 U.S. 386, 393 (2004) ("[W]e have recognized an equitable exception to the bar when a habeas applicant can

demonstrate cause and prejudice for the procedural default."). Moreover, this Court has never recognized the right to counsel in Federal or State collateral post-conviction proceedings. Consequently, construing § 2254(i) to only preclude the granting of a petition for writ of habeas corpus on these grounds would "render[ ] the provision entirely superfluous." *Post*, 422 F.3d at 423 n.1 (noting that to interpret § 2254(i) to only bar habeas relief would require the conclusion "that Congress enacted the provision to bar only . . . relief that is clearly not a valid form of habeas relief" based on existing law). Thus, 28 U.S.C. § 2254(i) bars a federal court from using the ineffectiveness of collateral-review counsel as a ground for relieving a procedural default.

Furthermore, even assuming that the statute's plain language does not preclude Martinez's argument, adopting Martinez's position would thwart Congress's general intent in passing AEDPA. "Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases. . . ." *Woodford v. Garceau*, 538 U.S. 202, 206 (2003). Allowing ineffective assistance of post-conviction counsel to serve as "cause" to overcome a procedural default would be particularly problematic in capital cases, where ineffective-assistance claims are routinely asserted. *See* U.S. Judicial Conference, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal, 5 (1989) ("The inmate under capital sentence, whose guilt frequently is never in

question, has every incentive to delay the proceedings that must take place before that sentence is carried out."); *see also* Hoffman & King, Rethinking the Federal Role in State Criminal Justice, 84 N.Y.U. L. REV. 791, 806-10 (2009) (noting that because as a practical matter, it is difficult for the "vast majority" of non-capital defendants to seek federal habeas relief before their sentences expire).

Allowing the ineffectiveness of collateral-review counsel to serve as cause would also violate the spirit, if not the letter, of § 2254(i) because, even though the claim would only go to cause, a federal court would still have to conclude that a habeas petitioner's collateral-review counsel was ineffective before granting habeas relief. Further, state proceedings would be delayed to allow the exhaustion of collateral-review claims in state court.

Additionally, if the underlying ineffective-assistance-of-trial-counsel claim is not resolved on the merits in state court, federal court consideration of the merits of the claim results in an end-run around AEDPA's deferential standard of review. *See* 28 U.S.C. § 2254(d) (providing that habeas relief may not be granted "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim" was unreasonable either legally or factually). This would frustrate Congress's intent in enacting AEDPA, *i.e.*, to promote comity, finality, and federalism. *See Cullen v. Pinholster*, ___, U.S. ___, 131 S. Ct. 1388, 1401 (2011).

This Court does not "lightly assume that Congress meant to restrict the equitable powers of the federal courts. . . ." *Miller v. French*, 530 U.S. 327, 336 (2000). Allowing the ineffectiveness of collateral-review counsel to constitute "cause," however, would directly contravene AEDPA. Thus, this Court should conclude that Congress intended to limit the Court's equitable powers by not allowing the ineffectiveness of collateral-review counsel to constitute cause for procedurally defaulted claims in federal habeas proceedings.[10] *See id.* at 336 ("[W]here Congress has made its intent clear, we must give effect to that intent.") (citation and internal quotation marks omitted).

IV. *TEAGUE* PREVENTS MARTINEZ FROM ESTABLISHING "CAUSE" BASED ON ANY NEWLY-RECOGNIZED RIGHT TO COLLATERAL-REVIEW COUNSEL.

Even if Martinez could convince this Court that he had a constitutional right to the effective assistance of collateral-review counsel (to raise an

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[10] There is no constitutional problem with finding that the ineffectiveness of collateral counsel does not constitute cause. Congress has plenary authority to define the scope of habeas relief in § 2254. *See Felker v. Turpin*, 518 U.S. 651, 664 (1996) (recognizing "that judgments about the proper scope of the writ [of habeas corpus] are 'normally for Congress to make'") (quoting *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996)). Consequently fashioning a rule consistent with Congress's clear intent does not raise any constitutional issues.

ineffective-assistance-of-trial-counsel claim), he could not show cause because this would amount to a "new rule" that would not be applicable to his case. *Teague*, 489 U.S. at 305-11.[11]

A rule is new if it "was not dictated by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301. The Arizona Supreme Court denied review of Martinez's convictions and sentences on September 21, 2004. (Pet. App. at 40a.) Martinez's conviction became final 90 days later on December 20, 2004, when the time for filing a petition for writ of certiorari expired. *See Caspari v.*

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[11] At the certiorari stage, Martinez argued that the State waived a *Teague* argument by not adequately raising it below. This Court, however, "undoubtedly" has the discretion to reach the argument. *Schiro v. Farley*, 510 U.S. 222, 229 (1994). It should do so for at least two reasons. First, the district court and the court of appeals were both bound by circuit precedent concluding there was no right to counsel in post-conviction-relief proceedings. *See Ellis v. Armenakis*, 222 F.3d 627, 633 (9th Cir. 2000) (holding there is "no constitutional right to counsel during state habeas proceedings even if that was the first forum in which a defendant could challenge the constitutional competence of counsel"). The three-judge panel that decided Martinez's federal appeal was bound by this case law. *Delia v. City of Rialto*, 621 F.3d 1069, 1080 (9th Cir. 2010). Thus, because the Court of Appeals denied Martinez's rehearing *en banc* without requiring a response (Resp. App. at 85a), there was no need to make a *Teague* argument in the lower courts. Second, the State *did* raise *Teague* in its brief in opposition to the petition for certiorari. *See Farley*, 510 U.S. at 229 (declining to reach *Teague* argument, but suggesting argument would have been reached if it had been raised in the brief in opposition to the petition for certiorari).

Bohlen, 510 U.S. 383, 391 (1994). The rule Martinez seeks in the instant case "was not *dictated* by precedent existing when his conviction became final." *Id.* (quoting *Teague*, 489 U.S., at 301). In fact, even after Martinez's conviction became final, this Court noted that there is "no constitutional right to counsel" in the post-conviction context. *Lawrence v. Florida*, 549 U.S. 327, 337 (2007).

Under *Teague*, a "new rule" only applies retroactively in a collateral proceeding if: (1) the rule changes the scope of conduct previously held criminal; or (2) the rule is a "watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004) (citations and internal quotation marks omitted). Neither exception applies in this case.

First, the creation of a right to the effective assistance of counsel on collateral review has no bearing on the "proscribed conduct" for which Martinez was convicted. *See Butler v. McKellar*, 494 U.S. 407, 415 (1990) (finding *Teague's* first exception inapplicable where the new rule did not affect the defendant's "proscribed conduct"). Second, the creation of a new rule in this case would not be a "watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Summerlin*, 542 U.S. at 353. This is because the "criminal proceeding" at issue for the purposes of *Teague* is the trial, not a subsequent proceeding provided to a defendant as a matter of

grace. *See Beard v. Banks*, 542 U.S. 406, 417-20 (2004) (noting that the only example the Court has cited as a rule of criminal procedure that would be retroactive under *Teague* is the right to counsel at trial in felony cases).

In *Simmons v. Kapture*, 516 F.3d 450, 451 (6th Cir. 2008), the Sixth Circuit concluded that this Court's decision in *Halbert* is not applicable to cases on collateral review at the time it was decided. This Court should similarly decline to retroactively apply a new rule relating to the effectiveness of post-conviction counsel in non-plea cases, to any extent such a new rule is announced.

In his reply in support of his petition for certiorari, Martinez notes that the rule announced in *Douglas* was applied retroactively. (Cert. Reply Brief, at 10-11.) This, however, was long before *Teague*. In contrast, this Court has recognized in a post-*Teague* case that a new rule cannot be a "watershed rule of criminal procedure" if it only affects a criminal defendant's appellate rights. *See Goeke v. Branch*, 514 U.S. 115, 120 (1995) (concluding that rule barring state courts from dismissing recaptured fugitive's appeal was "not among the small core of rules requiring observance of those procedures that are implicit in the concept of ordered liberty . . . [b]ecause due process does not require a State to provide appellate process at all") (citations and internal quotation marks omitted). Likewise, because States are not required to provide collateral review, a new rule requiring the appointment of counsel in such proceedings—as a matter of logic—is not a watershed rule of criminal procedure.

Finally, even though Martinez is attempting to use a new rule as "cause" and not as a substantive ground for relief, *Teague* still applies. First, *Teague* does not limit the general rule of non-retroactivity to an underlying ground for relief; instead, *Teague* stands for the broad proposition that new rules are not "applicable" in any "case" on collateral review. *See id.* 489 U.S. at 310 ("Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."). Second, the rule adopted in *Teague* "effectuates the States' interest in the finality of criminal convictions and fosters comity between federal and state courts." *Gilmore v. Taylor*, 508 U.S. 333, 340 (1993). These same interests—finality, comity, and federalism—are also at issue when a new rule is asserted as cause. This is because an entitlement to relief would be based, at least in part, on the application of a new rule that was not in existence when the state court ruled on the claim.

This Court has held that an ineffective-assistance-of-counsel claim cannot constitute cause for a procedural default unless *that* claim has been properly presented to the state courts.[12] *Edwards*, 529

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[12] This Court has not determined whether a state court's rejection of an ineffectiveness claim is entitled to deference under 28 U.S.C. § 2254(d)(1) when the claim is being asserted as cause as opposed to a substantive ground for relief. *Edwards*, however, suggests an affirmative answer to the question because, otherwise, the deference owed to a state court decision

(Continued on following page)

U.S. at 451. Here, Martinez presented his ineffective-assistance-of-post-conviction-counsel claim to the state courts, and the courts properly rejected it under settled law. A new rule should not be applied in this instance to effectively reverse the state court ruling. *See Teague*, 489 U.S. at 306 (noting that the possibility of habeas relief provides an incentive for state courts to properly apply "established constitutional standards," but further noting that "the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place" to "perform this deterrence function").

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rejecting such a claim under § 2254(d)(1) would be "illusory." 529 U.S. at 452. Here, the Arizona Court of Appeals' rejection of Martinez's contention that he was entitled to the effective assistance of collateral-review counsel was clearly not "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

CONCLUSION

For these reasons, the State respectfully requests this Court to affirm the opinion of the Court of Appeals.

Respectfully submitted,

THOMAS C. HORNE
Attorney General

DAVID R. COLE
Solicitor General

KENT E. CATTANI
Chief Counsel
Criminal Appeals/
Capital Litigation Division

MICHAEL T. O'TOOLE
Assistant Attorney General
(*Counsel of Record*)
1275 W. Washington
Phoenix, Arizona 85007-2997
Telephone: (602) 542-4686

REPLY BRIEF

Supreme Court, U.S.
SEP 26 2011
OFFICE OF THE CLERK

No. 10-1001

IN THE

Supreme Court of the United States

LUIS MARIANO MARTINEZ,

Petitioner,

v.

CHARLES L. RYAN, Director,
Arizona Department of Corrections,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

ROBERT BARTELS
Counsel of Record
SANDRA DAY O'CONNOR COLLEGE OF LAW
ARIZONA STATE UNIVERSITY
Tempe, AZ 85287-7906
(480) 965-7053
Robert.Bartels@asu.edu

Attorney for Petitioner

238076

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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QUESTION PRESENTED

The "Question Presented" on page i of Respondent's Merits Brief bears little resemblance to the Question Presented in the Petition for a Writ of Certiorari that this Court granted on June 6, 2011. Petitioner does not seek a general right to "effective assistance of collateral-review counsel"; and Petitioner has never argued that his state-law right to appointed counsel in a first post-conviction relief proceeding effectively created a federal constitutional right to the assistance of such counsel. The real Question Presented in this case is much narrower than Respondent's Brief would suggest.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
INTRODUCTION	1
ARGUMENT	3
I. PETITIONER HAD A FOURTEENTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF FIRST "POST-CONVICTION" COUNSEL WITH RESPECT TO ANY INEFFECTIVE-ASSISTANCE-OF-TRIAL-COUNSEL CLAIM	3
A. *Douglas*, *Ross*, and *Halbert*	3
B. *Finley*, *Giarratano*, and *Coleman*	6
C. The "[Non]infinite Continuum of Litigation"	9
II. TITLE 28 U.S.C. § 2254(i) DOES NOT PROHIBIT THE ASSERTION OF INEFFECTIVENESS OF FIRST-TIER REVIEW COUNSEL AS CAUSE TO EXCUSE THE PROCEDURAL DEFAULT OF A FEDERAL CLAIM FOR HABEAS RELIEF	13

Table of Contents

Page

III. THIS CASE PRESENTS NO GENUINE ISSUE OF "RETROACTIVITY" UNDER *TEAGUE V. LANE* 16

IV. THE REALISTICALLY POSSIBLE IMPACTS ON STATE RESOURCES ARE NOT SUFFICIENT TO OVERCOME THE FOURTEENTH AMENDMENT RIGHT TO COUNSEL FOR FIRST-TIER REVIEW IN "POST-CONVICTION" PROCEEDINGS 19

CONCLUSION 23

TABLE OF CITED AUTHORITIES

Page

CASES

Coleman v. Thompson,
501 U.S. 722 (1991) ..... *passim*

Danforth v. Minnesota,
552 U.S. 264 (2008) 17

Douglas v. California,
372 U.S. 353 (1963) ..... *passim*

Edwards v. Carpenter,
529 U.S. 446 (2000) 17

Evitts v. Lucey,
469 U.S. 387 (1985) 17, 18, 19, 20

Gonzalez v. Crosby,
545 U.S. 524 (2005) 11

Halbert v. Michigan,
545 U.S. 605 (2005) ..... *passim*

Holland v. Florida,
130 S. Ct. 2549 (2010) 14, 15

Hopkins v. Reeves,
524 U.S. 88 (1998) 16

Lonchar v. Thomas,
517 U.S. 314 (1996) 17

Cited Authorities

Page

Martinez v. Schriro,
623 F.3d 731 (9th Cir. 2010) 9

Massaro v. United States,
538 U.S. 500 (2003) 1, 4, 10

Mathews v. Eldridge,
424 U.S. 319 (1976) 11, 12

McConnell v. Rhay,
393 U.S. 2 (1968) 19

McKane v. Durston,
153 U.S. 684 (1984) 13

Murray v. Giarratano,
492 U.S. 1 (1989) ..... *passim*

Panetti v. Quarterman,
551 U.S. 930 (2007) 15

Pennsylvania v. Finley,
481 U.S. 551 (1987) ..... *passim*

Ross v. Moffitt,
417 U.S. 600 (1974). 3, 7, 11, 12

Schlup v. Delo,
513 U.S. 298 (1995) 16

Cited Authorities

Page

Smith v. Robbins,
528 U.S. 259 (2000) 10, 12

State ex rel. Rothering v. McCaughtry,
556 N.W.2d 136 (Wisc. App. 1996)..... 21

State v. Cox,
37 P.3d 437 (Ariz. App. 2002)..... 9

State v. Spreitz,
39 P.3d 525 (Ariz. 2002) 4

Stewart v. Smith,
46 P.3d 1067 (Ariz. 2002) 9

Stringer v. Black,
503 U.S. 222 (1992) 18

Teague v. Lane,
489 U.S. 288 (1989) 16, 17, 18

Turner v. Rogers,
131 S. Ct. 2507 (2011) 11, 12

Woodford v. Garceau,
538 U.S. 202 (2003) 17

CONSTITUTIONAL PROVISION

U.S. Const. amend. XIV 1, 3, 19

Cited Authorities

Page

STATUTES

28 U.S.C. § 2254 ..... 12, 14, 15

28 U.S.C. § 2254(d) 17

28 U.S.C. § 2254(d)(1) 17

28 U.S.C. § 2254(i) 13, 14, 15

28 U.S.C. § 2255 20

28 U.S.C. § 2255(h) 13

28 U.S.C. § 2255(h)(1) 13

28 U.S.C. § 2255(h)(2) 13

Wisc. Stat. § 974.06 21

OTHER AUTHORITIES

Administrative Office of U.S. Courts, JUDICIAL BUSINESS OF THE UNITED STATES COURTS (2010) 20

Findley, *Innocence Protection in the Appellate Process*, 93 Marq. L. Rev. 591 (2009) 4

Cited Authorities

Page

Kamisar, et al., MODERN CRIMINAL PROCEDURE (10th Ed. 2002) 20

www.azcourts.gov/Portals/39/2010DR/SuperiorTemporary.pdf 19

INTRODUCTION

Under Arizona law, the first opportunity for Petitioner to obtain judicial review of most claims that his conviction was in violation of state or federal law was provided by an "appeal," but Petitioner's first opportunity to obtain review of any claim that he did not receive constitutionally effective assistance of trial counsel was in a "post-conviction" proceeding. While such a division between first-tier review proceedings is not necessary (see States' Br. 25), there is nothing objectionable about it; and with regard to claims (like ineffective-trial-counsel claims) that typically require additional fact-finding, it makes sense for first-tier review to take place in a trial court. *Massaro v. United States*, 538 U.S. 500, 504-508 (2003).

But it would trivialize *Douglas v. California*, 372 U.S. 353 (1963), and *Halbert v. Michigan*, 545 U.S. 605 (2005), to say, as Respondent does, that a defendant has a Fourteenth Amendment right to counsel for the part of first-tier review that the State labels an "appeal," but not for a part of first-tier review that the State labels as "post-conviction." Moreover, first-tier review of ineffective-trial-counsel claims in a "post-conviction" (or "collateral") proceeding cannot be distinguished from the first-tier review proceedings in *Douglas* and *Halbert* on the ground that ineffective-assistance claims typically require development of evidence not already in the "appellate" record -- since that is a factor that makes the assistance of counsel even **more** important to the fundamental fairness of the review proceeding. Nor can one distinguish the usual "direct appeal" review from first-tier "post-conviction" review of an ineffective-trial-counsel claim on the ground that the latter occurs after

the conviction has become "final" upon completion of the former, since first-tier "post-conviction" review need not -- and in this case did not -- follow "direct appeal."

The foregoing does not conflict with this Court's holdings in *Pennsylvania v. Finley*, 481 U.S. 551 (1987), *Murray v. Giarratano*, 492 U.S. 1 (1989), and *Coleman v. Thompson*, 501 U.S. 722 (1991). Given the facts and reasoning in those cases, the stated rule that "there is no right to counsel in state collateral proceedings after exhaustion of direct appellate review," *Coleman*, 501 U.S. at 756, necessarily is a general rule which by its terms does not apply to a case (like this one) where the "post-conviction" proceeding began and ended long before the completion of "direct appeal," and which in any event may be subject to an exception for claims for which a "post-conviction" proceeding provides the first opportunity for review, *id.* at 755 -- an exception that is required by *Douglas* and *Halbert* for ineffective-trial-counsel claims in Arizona.

ARGUMENT

I. PETITIONER HAD A FOURTEENTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF FIRST "POST-CONVICTION" COUNSEL WITH RESPECT TO ANY INEFFECTIVE-ASSISTANCE-OF-TRIAL-COUNSEL CLAIM

A. *Douglas*, *Ross*, and *Halbert*

Although Respondent's Merits Brief (at 12-14, 17) summarizes *Douglas*, *Ross v. Moffitt*, 417 U.S. 600 (1974), and *Halbert* in some detail, it abandons most of the Brief in Opposition's efforts to distinguish *Douglas* and *Halbert* and analogize this case to *Ross*. But the arguments that Respondent now makes with regard to those cases (Resp. Br. 17-19) do not withstand scrutiny:

1. Respondent's argument that "[t]he conclusion of direct review renders a conviction 'final' and no longer subject to 'new rules' announced thereafter" (Resp. Br. 18) is especially peculiar, given that Arizona permits a defendant to commence a post-conviction proceeding **before** a direct appeal -- and that in this case the first post-conviction proceeding was commenced in May 2002 and terminated in April 2003, some 20 months **before** the conclusion of the direct appeal. (Pet. App. 40a-41a). Moreover, Respondent makes no attempt to refute Petitioner's demonstration (Pet. Br. 24-27) that even if state law required "post-conviction" proceedings to follow "direct appeal," it would make no sense to say that "post-conviction" proceedings did not provide first-tier review for ineffective-trial-counsel claims when such proceedings provided the first opportunity to raise such claims.

The procedural history of this case would allow this Court to explicitly narrow a decision in Petitioner's favor to cases in which first-tier "post-conviction" review of ineffective-trial-counsel claims preceded the conclusion of "direct" review (as it must in States like Wisconsin, *see* Findley, *Innocence Protection in the Appellate Process*, 93 Marq. L. Rev. 591, 610-11 (2009)[1]). However, such a narrowing approach would leave open questions in States in which first-tier review of ineffective-trial-counsel claims must await the conclusion of the "appeal."

2. Respondent also argues that "[u]nlike a record-based direct review, collateral proceedings provide a forum for developing facts that were not presented at trial." (Resp. Br. 19). However, that difference between "direct" and "collateral" review is one that makes a right to counsel even **more** essential in the latter, at least when it provides the first opportunity for review of a claim such as ineffectiveness of trial counsel. (Pet. Br. 19; ABA Br. 5-7).

The United States seeks to side-step the foregoing point by defending the practice of using trial-level "collateral" proceedings for first-tier review with a lengthy discussion of *Massaro* (U.S. Br. 20-22); and Respondent defends both *Massaro* and *State v. Spreitz*, 39 P.3d 525 (Ariz. 2002) (Resp. Br. 20-23). But Petitioner has never challenged *Massaro* or *Spreitz*, and he agrees with the point of both -- that ineffective-trial counsel claims typically depend on evidence outside the normal appellate record that is most appropriately developed in

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1. As if to illustrate the substantive unimportance of labels, Wisconsin's first-tier "post-conviction" procedure is part of the "appeal." *Id.* at 611.

a trial court. (Pet. Br. 19, 20). It is that point that makes the assistance of counsel for first-tier review of ineffective-trial-counsel claims **especially** important.[2]

3. The United States' other attempts to distinguish *Douglas* and *Halbert* also have no merit:

a. On at least six occasions, the United States suggests that a defendant seeking "post-conviction" review will already have received the assistance of counsel on "appeal." (U.S. Br. 11, 15, 16, 17, 19-20). But that obviously is not true when a "post-conviction" proceeding provides first-tier review for an ineffective-trial-counsel claim -- especially when (as in this case) the first post-conviction proceeding starts and ends before any review on "appeal."

b. The United States' "stage"/"categorical" theory (U.S. Br. 12, 14, 17) is wholly conclusory; and it does not explain why first-tier "review" is not the appropriate "stage" or "category" under *Douglas* and *Halbert*. Nor is the United States' occasional emphasis on the use of the word "appeal" in *Douglas* (U.S. Br. 9, 14, 15) persuasive: (a) It was natural for this Court to use that word in an opinion involving a proceeding that the State termed an "appeal"; (b) in *Halbert* the Court's stated holding was that the Fourteenth Amendment required "the appointment of counsel for defendants . . . who [sought] access to first-tier review," and the Court made it clear that the label

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2. The United States' suggestion that Petitioner's argument is simply that counsel "would be helpful" for first-tier review of an ineffective-trial-counsel claim (U.S. Br. 20) is misleading: Petitioner's argument is that counsel is **more** important for first-tier review of most ineffective-trial-counsel claims than for the kind of on-the-record first-tier review involved in *Douglas*.

"appeal" did not matter, 545 U.S. at 610, 619 (emphasis added); and (c) it would vitiate the constitutional right to counsel for first-tier review to make it turn on the State's label for such review.

B. *Finley*, *Giarratano*, and *Coleman*

1. Although Respondent's Brief in Opposition cited *Pennsylvania v. Finley* for the proposition that "there is no **generally**-recognized right to counsel in post-conviction proceedings," Respondent's Merits Brief asserts that in *Finley*, "this Court ruled **categorically** that the right to counsel does not apply to collateral-review proceedings." (BIO 9, Resp. Br. 14 [emphasis added]; see also U.S. Br. 10-12, 18-19). Respondent also cites *Murray v. Giarratano* as "applying *Finley* to capital cases." (Resp. Br. 16). The plurality opinion in *Giarratano* did cite to *Finley* for the general rule that "there was no federal constitutional right to counsel for indigent prisoners seeking state postconviction relief." 492 U.S. at 7-8. However, an examination of the facts in *Finley* and *Giarratano* -- and in *Coleman v. Thompson* -- shows that the **holdings** in *Finley* and *Giarratano* were not as "categorical" as Respondent now suggests:

a. In *Finley*, the defendant commenced a state post-conviction proceeding after her conviction had become final on "direct appeal"; and this Court's statement of the rule it was applying was that a defendant had "no federal constitutional right to counsel . . . **when attacking a conviction that has long since become final upon exhaustion of the appellate process.**" 481 U.S. at 553, 555 (emphasis added). Moreover, the post-conviction

proceeding in *Finley* plainly was not limited to issues for which that proceeding provided the first opportunity for review,[3] and neither the defendant nor this Court raised any argument that she should have a constitutional right to counsel specifically with respect to such issues. Consequently, there was no occasion for this Court to make any statement about a possible first-tier review exception to the general rule it articulated.[4]

b. *Giarratano* was a class action in which the District Court had ordered state officials to devise a system under which all present and future indigents who had been sentenced to death, and whose sentences had been affirmed on direct appeal, would be entitled to appointed counsel in state "habeas corpus" proceedings. 492 U.S. at 6-7. In reversing, a plurality of this Court rejected the inmates' contention that *Finley* did not apply to capital cases. However, the inmates did not make, and this Court did not consider, any argument that *Finley* should not

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3. In her pro se petition, Finley raised only issues that already had been litigated on direct appeal; and the additional issues that the post-conviction appellate court thought had "arguable merit" were based on the "bare record" and therefore could have been raised on direct appeal. *Id.* at 553, 568.

4. The *Finley* majority stated that the conclusion (in *Ross*) "that the defendant's access to the trial record and the appellate briefs and opinions provided sufficient tools for the pro se litigant to gain meaningful access to courts that possess a discretionary power of review . . . necessarily obtains with respect to postconviction review." *Id.* 557. That statement of course would not make sense with regard to claims for which a post-conviction proceeding provided first-tier review. (Pet. Br. 25-27).

apply to claims for which state habeas corpus provided the first opportunity for review.[5]

c. That the general rules articulated in *Finley* and *Giarratano* did not foreclose the possibility of any exceptions is confirmed by *Coleman*, in which this Court first stated the general rule that there was "no right to counsel in state collateral proceedings" -- but then declined to consider an exception to that rule "in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction" only because it would not have applied in *Coleman* itself (and not because it was foreclosed by *Finley*). 501 U.S. at 755.

2. Respondent also argues, for the first time in this litigation, that "collateral proceedings in Arizona (and other states) are generally limited to claims that could not have been pursued in a previous proceeding," and that "[a]ccordingly, Martinez is essentially asking this Court to overrule *Finley* and *Giarratano*." (Resp. Br. 16). Quite apart from the fact that there are claims that are raisable on direct appeal but not subject to preclusion or waiver in post-conviction proceedings in Arizona (as Respondent's

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5. Respondent attempts to make something of the fact that Justice Stevens' dissent in *Giarratano* pointed out that under Virginia law, "some claims ordinarily heard on direct review," including ineffective-trial-counsel claims, would be "relegated to postconviction proceedings," 492 U.S. at 24. (Resp. Br. 17). But Justice Stevens offered this aspect of state law as one of several reasons to recognize a general right to appointed counsel for all post-conviction claims in capital cases, and not as a reason for restricting the District Court's order to claims for which a post-conviction proceeding provided first-tier review, 492 U.S. at 19-29; and neither the plurality opinion nor Justice Kennedy's concurring opinion discussed Justice Stevens' above-referenced point.

use of the word "generally" recognizes),[6] Respondent's "overruling" argument is a non sequitur: Even if post-conviction relief in Arizona (and other unspecified states) currently was absolutely limited to first-tier review claims, that would say nothing about the scope of the holdings in *Finley* and *Giarratano*, which involved post-conviction proceedings in Pennsylvania and Virginia more than twenty years ago.

As is clear from the narrow question on which this Court granted certiorari, Petitioner does not ask this Court to overrule *Finley*, *Giarratano*, *Coleman*, or the general rule on which they were based. Instead, Petitioner asks this Court to rule on the question left open in *Coleman*, in the specific context of an ineffective-trial-counsel claim and a "post-conviction" proceeding which provided first-tier review for that claim (and which commenced and ended before Petitioner's conviction became "final" at the conclusion of "direct appeal").

C. The "[Non]infinite Continuum of Litigation"

Respondent and two of his amici raise the "infinite continuum of litigation" concern that was suggested by the Court of Appeals' opinion below, 623 F.3d at 742 (Pet. App. at 23a). (Resp. Br. 30-32; U.S. Br. 25-27; States' Br. 7-11, 36). But neither Respondent nor his amici refute Petitioner's theoretical and practical reasons why the "infinite continuum" concern is illusory (Pet. Br. 28-25).

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6. *See, e.g.*, *Stewart v. Smith*, 46 P.3d 1067, 1070-71 (Ariz. 2002) (claims of "sufficient constitutional magnitude"); *State v. Cox*, 37 P.3d 437, 440-41 (Ariz. App. 2002) (unlawful-sentence claims cannot be waived).

1. Respondent does not meaningfully address the beginning point of Petitioner's theoretical argument -- that a second post-conviction proceeding in which a defendant asserts that first post-conviction counsel was ineffective with respect to an ineffective-trial-counsel claim for relief necessarily will involve second-tier review of the trial-counsel claim in connection with the prejudice requirement for the first-post-conviction-counsel claim (Pet. Br. 29-20).[7] In this regard, Respondent's footnoted argument that second-tier review of the underlying ineffective-trial-counsel claim would be provided by a "petition for review [of the first post-conviction proceeding] in the Arizona appellate courts" (Resp. Br. 30, n. 8) is not correct[8] -- and even if it was correct, it would mean that a second post-conviction proceeding would provide **third**-tier

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7. Petitioner's Merits Brief incorrectly asserted that first post-conviction counsel's deficient performance could not result in the "prejudice" required for ineffectiveness "unless the defendant's ineffective-trial-counsel claim was valid." (Pet. Br. 29-20). That was an overstatement, because a showing of prejudice would require only a "**reasonable probability** that, but for counsel's unprofessional errors, the result of the [first post-conviction] proceeding would have been different." *Smith v. Robbins*, 528 U.S. 259, 286 (2000) (emphasis added). Nevertheless, in a second state post-conviction proceeding in which the defendant claimed that first post-conviction counsel was ineffective, the court would have to evaluate the ineffective-trial-counsel claim in applying the "reasonable probability" test for prejudice; and that court would have to provide a full second-tier review of that claim if the defendant was to obtain any actual relief. Consequently, the above-referenced overstatement does not affect the validity of Petitioner's theoretical argument (Pet. Br. 28-31).

8. That is because the record before the appellate court almost always would be inadequate for review of any ineffective-trial-counsel claim. *Massaro*, 538 U.S. at 504-508.

review of the ineffective-trial-counsel claim. Moreover, Respondent fails completely to address Petitioner's due process argument based on *Ross*, *Mathews v. Eldridge*, 424 U.S. 319 (1976), and *Turner v. Rogers*, 131 S.Ct. 2507 (2011) (Pet. Br. 31).

2. The responses of Respondent's amici to Petitioner's theoretical points concerning the "infinite continuum" are no more satisfactory:

a. The United States' argument is that

> [a] second post-conviction proceeding would be the initial opportunity for a prisoner to assert as a "basis for relief" [from the state court's judgment of conviction] that his first post-conviction counsel had been ineffective (by failing to argue, in turn, that the prisoner's trial or appellate counsel had been ineffective, which would be the basis for setting aside the state court judgment).

(U.S. Br. 26; emphasis added). But that argument is self-defeating, since it effectively accepts Petitioner's first theoretical point (that any assertion of ineffective assistance of first post-conviction counsel necessarily will entail second-opportunity review of the underlying ineffective-trial counsel claim for relief from the conviction).[9]

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9. The case that the United States cites, *Gonzalez v. Crosby*, 545 U.S. 524 (2005), makes it clear that an ineffective-assistance claim offered to avoid procedural default is not a claim for relief from a conviction. *Id.* at 532, n. 4.

b. The State amici's response to Petitioner's theoretical argument consists of incorrectly stating that *Smith v. Robbins*, 528 U.S. 259 (2000), "is not about *Strickland*'s prejudice standard"[10] and inaccurately citing *Douglas* and *Halbert* for a proposition about appointment of counsel that in any event would not be pertinent to ineffective-assistance-of-counsel claims. (States' Br. 9-10).

c. Neither the United States nor the State amici respond to Petitioner's argument based on *Ross*, *Mathews*, and *Turner*.[11]

3. Respondent makes no response to Petitioner's demonstration that, as a practical matter, any theoretically possible "infinite continuum of litigation" would, or could, be prevented by procedural barriers such as statutes of limitation and restrictions on successive post-conviction petitions (Pet. Br. 32-35). And the attempts by Respondent's amici to address some of Petitioner's pragmatic points are unpersuasive:

a. With respect to statutes of limitation, the United States and the State amici focus only on a tolling provision of the federal statute of limitation for § 2254 cases (U.S. Br. 27; States' Br. 10), ignoring the fact that Arizona's time limitation for post-conviction cases is not subject to any tolling provision that applies to ineffective-assistance claims (see Pet. Br. 32, n. 10). And while the State amici refer to "States that have lengthier or less rigidly defined

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10. In fact, *Robbins* is very much about *Strickland*'s "prejudice" standard. 528 U.S. at 285-89.

11. The Criminal Justice Legal Foundation Amicus Brief does not discuss the "infinite continuum" issue.

limitation periods [than Arizona]" (States' Br. 36), they suggest no reason why such States could not shorten those periods or make them more "rigid."

b. The United States' discussion of restrictions on successive petitions raises only a question about the applicability of "28 U.S.C. § 2244(b) or similarly-worded state provisions" (U.S. Br. 27), and neither the United States nor the State amici suggest any legitimate reason why the States could not impose stricter -- or flat -- prohibitions on successive petitions under *McKane v. Durston*, 153 U.S. 684 (1984).[12]

II. TITLE 28 U.S.C. § 2254(i) DOES NOT PROHIBIT THE ASSERTION OF INEFFECTIVENESS OF FIRST-TIER REVIEW COUNSEL AS CAUSE TO EXCUSE THE PROCEDURAL DEFAULT OF A FEDERAL CLAIM FOR HABEAS RELIEF

Respondent's argument that 28 U.S.C. § 2254(i) prohibits Petitioner from asserting the ineffectiveness of first post-conviction counsel as cause to overcome Respondent's procedural-default defense (Resp. Br. 32-35) is not tenable, for several reasons.

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12. The State amici suggest that 28 U.S.C. § 2255(h) would become unconstitutional in the ineffective-trial-counsel context, since it would "eliminate a forum for presenting ineffective assistance of constitutionally mandated counsel claims except in those very narrow circumstances set out in § 2255(h)(1) and (2)." (States' Br. 11). But that suggestion proves too much even in the federal context, as it would apply to every constitutional claim for relief; and it makes no sense at all in the state post-conviction context, given *McKane v. Durston*, *supra*.

A. Section 2254(i) provides that "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." But Petitioner has not asserted ineffectiveness of first post-conviction counsel as a ground for habeas relief. Petitioner's ground for habeas relief is ineffective assistance of trial counsel; and he asserts that first post-conviction counsel was ineffective only as a means of overcoming Respondent's procedural default defense (to the ineffective-trial-counsel ground for relief).

B. Respondent's position is that § 2254(i) means to say that the ineffectiveness or incompetence of counsel in a "collateral" post-conviction proceeding "shall not be a ground for **substantive relief or relief from a procedural barrier to substantive relief**" in a § 2254 proceeding. But that position is inconsistent with this Court's holding and reasoning in *Holland v. Florida*, 130 S.Ct. 2549 (2010):

1. In *Holland*, this Court held that unprofessional conduct by federal habeas corpus counsel may be sufficiently extraordinary to overcome AEDPA's statute of limitation on equitable grounds (even though AEDPA does not say so). *Id.* at 2563-64. That holding of course would not have been possible if § 2254(i) meant that ineffectiveness or incompetence of counsel in a federal or state post-conviction proceeding could not be a ground for relief from a procedural barrier to substantive relief in a § 2254 proceeding.

2. The result in *Holland* cannot be explained as a result of oversight, since the respondent's merits brief in *Holland* (at 31-33) argued at some length that § 2254(i)

implied that the professional misconduct of Holland's federal habeas counsel could not provide a basis for "relief" from AEDPA's statute of limitation. Moreover, in stating that "Holland does not argue that his attorney's misconduct provides a **substantive** ground for relief, cf. § 2254(i)," 130 S.Ct. at 2563 (emphasis added), this Court clearly indicated that § 2254(i) concerned substantive, and not procedural, grounds for relief.[13]

C. The result and above-quoted language in *Holland* are consistent with the normal meaning of "relief" in a § 2254 proceeding -- i.e., relief from the State court judgment at issue. If Congress had intended § 2254(i) to apply to "relief" from procedural defenses, it would have been simple for Congress to actually say so (as indicated in para. B, above) -- but it did not.

D. This Court has resisted interpretations of AEDPA "that would 'produce troublesome results,' 'create procedural anomalies,' and 'close our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent.'" *Panetti v. Quarterman*, 551 U.S. 930, 946 (2007). Such resistance is especially appropriate here, since Respondent's proposed misapplication of § 2254(i) to this case would be inconsistent with *Holland*, with the rule from *Coleman* that a procedural default is excused when it is caused by constitutionally ineffective assistance of counsel, 501 U.S. at 753-54, and with the constitutional right to counsel for first-tier review recognized in *Douglas* and *Halbert*.

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13. All of the lower court decisions cited by Respondent (Resp. Br. 33) were decided several years before *Holland*.

III. THIS CASE PRESENTS NO GENUINE ISSUE OF "RETROACTIVITY" UNDER *TEAGUE V. LANE*

A. Respondent did not raise any issue relating to *Teague v. Lane*, 489 U.S. 288 (1989), in his Answer in the District Court (USDC DN-10) or in his Answering Brief in the Court of Appeals; and the *Teague* "argument" included in Respondent's Brief in Opposition (at 22) consisted of one conclusory sentence. Moreover, this Court's June 6, 2011 Order granting the Petition for a Writ of Certiorari gave no indication that it encompassed any issues beyond the single question presented in the petition. Given that background, this Court should not exercise its discretion to consider the somewhat expanded *Teague* argument presented for the first time in Respondent's Brief on the Merits (at 36-41). *See Hopkins v. Reeves*, 524 U.S. 88, 94 n. 3 (1998).

B. This is especially so because of the many problems with Respondent's new *Teague* argument:

1. Relying primarily on the phrase "new constitutional rules of criminal procedure" in the plurality portion of Justice O'Connor's opinion in *Teague*, Respondent asserts that *Teague* applies even though Petitioner seeks to "use a 'new' rule as 'cause' and not as a substantive ground for relief." (Resp. Br. 40). But that assertion ignores the related facts that this Court has never applied *Teague* to a rule governing a "collateral" proceeding,[14] and that in *Schlup v. Delo*, 513 U.S. 298 (1995), this Court developed and applied a new rule concerning the "actual innocence"

14. This statement is based on Petitioner's counsel's review of the 95 decisions by this Court in which *Teague* has been cited.

gateway past procedural default in a federal habeas corpus action, without any consideration of its retroactivity.[15] This is consistent with this Court's statement in *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996), that *Teague* applies when federal "claims" in habeas proceedings are "based on certain 'new rules' of constitutional law." *See also Danforth v. Minnesota*, 552 U.S. 264, 266 (2008) (referring to "new rules" that "provide the basis for a federal collateral attack on a state-court conviction").[16]

2. Even if *Teague* applied to "new" rules governing "collateral" proceedings, Respondent's *Teague* argument would fail because the federal right to effective assistance of counsel with respect to an ineffective-trial-counsel claim, in the first review proceeding in which the State permits review of such a claim, would not be a "new" rule in this case. The rule established by *Douglas* and *Evitts v. Lucey*, 469 U.S. 387 (1985), was that a convicted defendant was entitled to appointed (and effective) counsel in a proceeding that provided the first opportunity to present a challenge to the conviction. As previously noted,

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15. The *Teague* rule for the cases to which "new" rules of criminal procedure generally will apply -- "cases which have [not] become final before the new rules are announced," 489 U.S. at 310 -- also indicates that it was not intended to apply to new rules governing "collateral" proceedings (which typically occur after convictions have become "final").

16. Respondent's invocation of *Edwards v. Carpenter*, 529 U.S. 446 (2000), and 28 U.S.C. § 2254(d)(1) (Resp. Br. at 40-41) is misplaced. As Respondent has conceded, Petitioner satisfied *Edwards*' exhaustion requirement, and *Edwards* does not concern (or even mention) 28 U.S.C. § 2254(d)(1). Moreover, this Court has indicated that § 2254(d) concerns "claims" for habeas relief on the merits. *Woodford v. Garceau*, 538 U.S. 202, 207 (2003)).

it would unreasonably trivialize this rule to say that it was limited to claims for which the State had labelled the first opportunity for review an "appeal"; and the fact that ineffective-trial-counsel claims typically depend on evidence outside the usual appellate record is an additional reason in favor of applying the *Douglas/Evitts* rule to such claims.

The foregoing points are illustrated by *Stringer v. Black*, 503 U.S. 222 (1992), in which Mississippi argued that "it was a new rule to apply the *Godfrey* [*v. Georgia*] and *Maynard* [*v. Cartwright*] holdings to the Mississippi [capital] sentencing process." *Id.* at 229. This Court rejected that argument, even though the language of the Mississippi aggravating circumstance at issue in *Stringer* differed from that of the Georgia circumstance invalidated in *Godfrey* as "vague and imprecise," and even though Mississippi was a "weighing" state but Georgia was not -- because Mississippi's status as a "weighing" state made the *Godfrey* rule even more clearly applicable. *Id.* at 228-237. Similarly in this case, the *Douglas/Evitts* rule is even more clearly applicable when first-tier review depends on evidence outside the usual appellate record.

3. Even if the right to counsel in the first proceeding in which an ineffective-assistance-of-trial-counsel claim could be raised somehow amounted to a "new" rule, it would be retroactively applicable under *Teague* because it would be a "watershed" rule "without which the likelihood of an accurate conviction is seriously diminished." 489 U.S. at 311, 313. In *Teague* itself, this Court recognized the right to counsel at trial as a primary example of a "watershed" rule, 489 U.S. at 311; and effective assistance of first-tier review counsel is essential to the protection

of that right. *See McConnell v. Rhay*, 393 U.S. 2, 3 (1968) (*Douglas* right to counsel on first-tier review relates to "the very integrity of the fact-finding process").

IV. THE REALISTICALLY POSSIBLE IMPACTS ON STATE RESOURCES ARE NOT SUFFICIENT TO OVERCOME THE FOURTEENTH AMENDMENT RIGHT TO COUNSEL FOR FIRST-TIER REVIEW IN "POST-CONVICTION" PROCEEDINGS

Aside from the "infinite continuum" argument addressed above, Respondent's Merits Brief does not say much about the possible impact on state resources of recognizing the constitutional right to effective first-tier review counsel for ineffective-trial-counsel claims. However, the United States gives some attention to the resources issue, and the State amici devote several pages to it. As the following paragraphs will show, the resources concerns raised by Respondent and his amici are overblown, unsupported, and insufficient to overcome the Fourteenth Amendment right to first-tier review counsel recognized in *Douglas*, *Evitts*, and *Halbert*.

A. Before addressing specific resources arguments, it will be useful to make one overarching point. Neither Respondent nor his amici dispute the fact that in Arizona, the number of post-conviction relief filings is less than 4% of the number of felony cases in which defendants are sentenced. (Pet. Br. 34, n. 12).[17] Thus, post-conviction

17. The statistics cited in Petitioner's Merits Brief were for "criminal" cases in the Arizona Supreme Court's database, in which approximately 96% of the "criminal" cases are felony cases. http://www.azcourts.gov/Portals/39/2010DR/SuperiorTemporary.pdf, pp. 3-5.

proceedings comprise a very small part of the criminal justice system -- even in a State that already provides counsel for all first post-conviction proceedings.[18]

B. Respondent and two of his amici argue that a decision in Petitioner's favor would require appointment of counsel for other claims (besides ineffective-trial-counsel claims) for which "post-conviction" proceedings provide first-tier review. (Resp. Br. 20; U.S. Br. 23; States' Br. 6-7). While this case concerns only the Fourteenth Amendment right to counsel for first-tier review of ineffective-trial-counsel claims (in a post-conviction proceeding that preceded the conclusion of "direct review"), Petitioner would not dispute that *Douglas*, *Evitts*, and *Halbert* apply to first-tier review of other claims. Even assuming that a post-conviction proceeding would provide first-tier review for all of the other claims identified by Respondent and his amici,[19] however, those claims would be a small fraction of the state and federal claims for which the States are

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18. In this regard, Arizona's experience is consistent with that of other States, in which (as of 2002), "annual postconviction challenges typically [fell] below 5% of all felony filings," Kamisar, et al., MODERN CRIMINAL PROCEDURE 29 (10th Ed. 2002), and with the federal system, in which the number of § 2255 motions was less than 6% of the number of defendants whose criminal cases were terminated in 2010, Administrative Office of U.S. Courts, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 148, 204 (2010).

19. For essentially the same reasons outlined in Argument section II(D)(1) of Petitioner's Merits Brief (at 29-31), it is doubtful that a defendant would have a constitutional right to counsel for post-conviction review of an ineffective-appellate-counsel claim (which would involve second-tier review of whatever claim(s) for relief appellate counsel failed to raise).

constitutionally required to provide counsel on "direct appeal."

C. The United States also seems to assert that once counsel was appointed to represent a defendant in a post-conviction proceeding with regard to any ineffective-trial-counsel claim, counsel would be free to represent the defendant, as constitutionally appointed counsel, with regard to other, non-first-tier review claims. (U.S. Br. 24). But that simply is not so: Any State constitutionally could restrict the appointment of post-conviction counsel to first-tier review claims (and to refuse to compensate appointed counsel for work on other claims).

D. The State amici make the only real empirical attempt to show the potential costs of the constitutional right to counsel for first-tier review for ineffective-trial-counsel claims. (States' Br. 29-33). However, the State amici's "analysis" of non-public statistics concerning appeals in Wisconsin is incomprehensible -- except that it is clear that the inclusion of all "§ 974.06 appeals" in the analysis makes it irrelevant to this case, since § 974.06 petitions may raise issues other than effective assistance of first post-conviction counsel. *State ex rel. Rothering v. McCaughtry*, 556 N.W.2d 136, 139 n. 8 (Wisc. App. 1996).[20]

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20. The State amici's assertion that § 974.06 cases "almost always raise a claim of ineffective assistance of 'first-tier' counsel" (States' Br. 31) is not supported by their citation to *Rothering* -- which simply noted that "it may be in some circumstances that ineffective postconviction counsel constitutes a sufficient reason as to why an issue which could have been raised on direct appeal was not." 556 N.W.2d at 139 (emphasis added).

E. The State amici also argue that there should be no constitutional right to first-tier review counsel, even with respect to an ineffective-trial-counsel claim, because "[f]unding for collateral-review-counsel would likely come from the same pot used to pay for criminal defense attorneys at the more critical stages of trial and direct appeal." (States' Br. 13). There are many problems with this argument, among which are that it effectively ignores the States' constitutional duty to provide adequate funding for effective assistance of trial counsel; that it incorrectly assumes that each State has a single "pot" for criminal defense to which it cannot allocate additional funds; and that it distinguishes between "direct appeal" and first-tier review in a "collateral" proceeding on the basis of their labels.[21] In any event, this kind of resource-reallocation argument was made much more persuasively in *Halbert*, 545 U.S. at 625, 630-31 (dissenting opinion by Justice Thomas), in which this Court upheld the right to counsel for first-tier review of the merits of a defendant's claims for relief from his conviction and sentence. Moreover, whatever the resource consequences for those States that do not already provide for first-tier review in "post-conviction" proceedings may be, they cannot compare to the resource consequences of *Douglas* in the "appeal" context.

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21. It is especially odd that this argument is made by amici represented by the Attorney General of Wisconsin, since Wisconsin regards initial "post-conviction" proceedings in aid of an ineffective-trial-counsel claim as part of the "direct appeal" -- and recognizes a constitutional right to counsel in such proceedings. (States' Br. 25, 30-31).

CONCLUSION

For the reasons stated above and in Petitioner's Merits Brief, this Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

ROBERT BARTELS
Counsel of Record
SANDRA DAY O'CONNOR
COLLEGE OF LAW
ARIZONA STATE UNIVERSITY
Tempe, AZ 85287-7906
(480) 965-7053
Robert.Bartels@asu.edu

Attorney for Petitioner

AMICUS CURIAE BRIEF

No. 10-1001

In the Supreme Court of the United States

LUIS MARIANO MARTINEZ, PETITIONER

v.

CHARLES L. RYAN, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

LANNY A. BREUER
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

JEFFREY B. WALL
Assistant to the Solicitor General

SCOTT A.C. MEISLER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a prisoner who has received the assistance of counsel at trial and on direct appeal has a constitutional right to the assistance of counsel on collateral review, when such review is the first opportunity for the prisoner to raise a particular claim of error.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 7
Argument:
Prisoners who have received the assistance of counsel at trial and on direct appeal have no federal constitutional right to such counsel on collateral review, even if collateral review is the first opportunity to raise a particular claim of error 8
A. The Sixth and Fourteenth Amendments require the effective assistance of counsel during a criminal trial and direct appeal but not on collateral review 9
1. This Court has repeatedly held that the right to counsel attaches only to a criminal trial and direct appeal 9
2. Extending the right to counsel to postconviction proceedings on a case-by-case basis would be inconsistent with this Court's categorical approach 12
3. Due process and equal protection principles do not support extending the right to counsel to postconviction proceedings that are the first opportunity for a prisoner to raise a particular claim of error 18
B. Extending the right to counsel to certain postconviction proceedings would create serious and unnecessary administrative difficulties 22
1. Petitioner's proposed exception would reach well beyond claims of ineffective assistance of trial counsel 23

Table of Contents—Continued: Page

2. Petitioner's proposed exception would generate extensive additional litigation on the effectiveness of trial, appellate, and postconviction counsel 24
3. Petitioner's proposed exception also would generate additional litigation on the constitutionality of postconviction procedures 27
4. Petitioner's proposed exception is unnecessary in light of current state and federal law 29
Conclusion 34

TABLE OF AUTHORITIES

Cases:

Alabama v. *Shelton*, 535 U.S. 654 (2002) 14
Anders v. *California*, 386 U.S. 738 (1967) 28
Betts v. *Brady*, 316 U.S. 455 (1942) 13
Bonin v. *Vasquez*, 999 F.2d 425 (9th Cir. 1993) 24
Brady v. *Maryland*, 373 U.S. 83 (1963) 23
Breard v. *Netherland*, 949 F. Supp. 1255 (E.D. Va. 1996), aff'd, 134 F.3d 615 (4th Cir.), cert. denied, 523 U.S. 371 (1998) 26
Brecht v. *Abrahamson*, 507 U.S. 619 (1993) 30
Calderon v. *Thompson*, 523 U.S. 538 (1998) 30
Coleman v. *Thompson*, 501 U.S. 722 (1991) 8, 12, 25
Davis v. *United States*, 417 U.S. 333 (1974) 25
Dodd v. *United States*, 614 F.3d 512 (8th Cir. 2010) 24
Douglas v. *California*, 372 U.S. 353 (1963) 9, 14, 15, 17, 19, 28
Edwards v. *Carpenter*, 529 U.S. 446 (2000) 24

Cases—Continued: Page

Gagnon v. *Scarpelli*, 411 U.S. 778 (1973) 14
Gibson v. *Turpin*, 513 S.E.2d 186 (Ga.), cert. denied, 528 U.S. 946 (1999) 12
Gideon v. *Wainwright*, 372 U.S. 335 (1963) 9, 13
Gonzalez v. *Crosby*, 545 U.S. 524 (2005) 26
Halbert v. *Michigan*, 545 U.S. 605 (2005) 9, 15, 16, 17, 18, 19
Haywood v. *Drown*, 129 S. Ct. 2108 (2009) 30
Howlett v. *Rose*, 496 U.S. 356 (1990) 30
Jensen v. *State*, 688 N.W. 2d 374 (N.D. 2004) 31
Johnson v. *Zerbst*, 304 U.S. 458 (1938) 9
Jones v. *Barnes*, 463 U.S. 745 (1983) 24
Lawrence v. *Florida*, 549 U.S. 327 (2007) 12
Lewis v. *Casey*, 518 U.S. 343 (1996) 20
Mackall v. *Angelone*, 131 F.3d 442 (4th Cir. 1997), cert. denied, 522 U.S. 1100 (1998) 12
Martinez v. *California*, 444 U.S. 277 (1980) 30
Massaro v. *United States*, 538 U.S. 500 (2003) 1, 21, 22
Mayle v. *Felix*, 545 U.S. 644 (2005) 12
McCleskey v. *Zant*, 499 U.S. 467 (1991) 12
Mempha v. *Rhay*, 389 U.S. 128 (1967) 9, 14
Morris v. *State*, 765 N.W.2d 78 (Minn. 2009) 31
Murray v. *Giarratano*, 492 U.S. 1 (1989) 11, 13, 23
Pennsylvania v. *Finley*, 481 U.S. 551 (1987) ..... *passim*
People v. *Ligon*, 940 N.E.2d 1067 (Ill. 2010), cert. denied, 131 S.Ct. 1698 (2011) 12
Rinaldi v. *Yeager*, 384 U.S. 305 (1966) 19
Ross v. *Moffitt*, 417 U.S. 600 (1974) 10, 11, 19, 20

Cases—Continued: Page

Smith v. *Robbins*, 528 U.S. 259 (2000) 12
State v. *Hall*, 908 A.2d 766 (N.H. 2006) 32
State v. *Spreitz*, 39 P.3d 525 (Ariz. 2002) 4
Turner v. *Rogers*, 131 S. Ct. 2507 (2011) 14
United States v. *Ash*, 413 U.S. 300 (1973) 13
United States v. *Wade*, 388 U.S. 218 (1967) 9, 13
Willis v. *Price*, 353 S.E. 2d 488 (Ga. 1987) 31, 32

Constitution, statutes and rules:

U.S. Const.:
Amend. VI 7, 9, 13
Amend. XIV 7, 9, 10, 13, 19
Due Process Clause 9, 10, 15, 19
Equal Protection Clause 9, 15
18 U.S.C. 3006A(a)(2)(B) 1, 22, 32
28 U.S.C. 2241(a) 6
28 U.S.C. 2244(b) 27
28 U.S.C. 2244(d) 27
28 U.S.C. 2254 25
28 U.S.C. 2254(a) 6
28 U.S.C. 2255 (2006 & Supp. III 2009) 1, 22, 25
Ala. Code § 15-12-23 (LexisNexis Supp. 2010) 31, 32
Alaska Stat. § 18.85.100(c) (2010) 31
Conn. Gen. Stat. § 51-296(a) (West 2005) 31
Idaho Code Ann. § 19-4904 (2004) 31
Kan. Stat. Ann. § 22-4506 (1995) 31

Statutes and rules—Continued: Page

La. Code Crim. Proc. Ann. art. 930.7(C) (1990) 31
N.C. Gen. Stat. § 7A-451(a)(2) 31
Neb. Rev. Stat. Ann. § 29-3004 (LexisNexis 2009) ... 31, 32
R.I. Gen. Laws § 10-9.1-5 (1997) 31
Tenn. Code Ann. § 8-14-205 (2002) 31
Rules Governing Section 2254 Cases in the United States District Courts:
Rule 6(a) 32
Rule 8(c) 32
Rules Governing Section 2255 Proceedings for the United States District Courts:
Rule 6(a) 32
Rule 8(c) 32
Ariz. R. Crim. P.:
Rule 32.2(a) 5
Rule 32.4(a) 3, 21
Rule 32.4(c)(2) 3, 4
Rule 34.2(c)(2) 31
Ark. R. Crim. P. 37.3 (b) 31
Del. Super. Ct. R. Crim. P. 61(e)(1) 32
Ind. R. Post Conviction Remedies 1 § 9(a) 31
Ky. R. Crim. P. 11.42(5) 31
Mass. R. Crim. P. 30(c)(5) 31
Me. R. Crim. P.:
Rule 69 31
Rule 70(c) 31
Mich. R. Crim. P. 6.505(A) 31

Rules—Continued: Page

N.J. Ct. R. 3:22-6(b) 31
N.M. Dist. Ct. R. Crim. P. 5-802 31
S.C. R. Civ. P. 71.1(d) 31
Wash. R. App. Proc. 16.15(h) 31

Miscellaneous:

Administrative Office of U.S. Courts, *Judicial Business of the United States Courts* (2010) 33
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Victor E. Flango, *Habeas Corpus in State and Federal Courts* (1994) 25, 32
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Miscellaneous—Continued: Page

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John Scalia, U.S. Dep't of Justice, *Prisoner Petitions Filed in U.S. District Courts, 2000, with Trends 1980-2000* (2002) 33

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In the Supreme Court of the United States

No. 10-1001

LUIS MARIANO MARTINEZ, PETITIONER

v.

CHARLES L. RYAN, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents the question whether a state prisoner who is prohibited by state law from raising a claim of ineffective assistance of trial counsel before collateral review has a federal constitutional right to the effective assistance of counsel in presenting that claim in collateral proceedings. Federal courts generally postpone adjudication of ineffective-assistance-of-counsel claims until collateral review, at which time federal prisoners may raise those claims in a motion for relief under 28 U.S.C. 2255 (2006 & Supp. III 2009). See *Massaro* v. *United States*, 538 U.S. 500, 504-505 (2003). Federal courts may appoint counsel for indigent Section 2255 movants if "the interests of justice so require," 18 U.S.C.

3006A(a)(2)(B), but federal prisoners are not guaranteed the assistance of counsel in postconviction proceedings. Because federal law treats the appointment of counsel in postconviction proceedings as discretionary rather than mandatory, the United States has a substantial interest in this Court's resolution of the question presented.

STATEMENT

1. Petitioner was charged by the State of Arizona with two counts of sexual conduct with a minor under the age of 15. According to the State, on July 10, 1999, petitioner twice had sexual intercourse with his stepdaughter, who was 11 years old at the time. Pet. App. 38a. That morning, the victim called her mother and reported that petitioner "had laid on top of her like adults do" and done "nasty things with her," including putting his "privates in her." 2:08-cv-00785 Docket entry No. (Dkt. No.) 10-2, at 30 (D. Ariz. July 28, 2008). The victim also told an investigating police officer later that day that, after the initial assault in her bedroom, petitioner had pushed her to the kitchen floor and again placed his penis inside of her. *Ibid.* Five days after the assaults, the victim repeated those allegations to a social worker during a videotaped forensic interview. *Id.* at 30-31.

Before trial, however, the victim recanted her accusations, first to family members and then to the same social worker during a second videotaped interview. Pet. App. 38a. Petitioner presented all of that evidence in his defense at trial. *Ibid.* The State nevertheless argued that petitioner was guilty based on the victim's initial accusations; expert testimony on the tendency of child molestation victims to recant; and physical evidence—specifically, skin and semen cells on the victim's

nightgown that matched petitioner's DNA. Dkt. No. 10-2, at 31. After deliberating for eight hours, the jury found petitioner guilty on both counts. Pet. App. 73a. In February 2002, petitioner was sentenced in Arizona Superior Court to consecutive terms of life imprisonment with no possibility of parole for 35 years. *Id.* at 39a.

2. a. On direct appeal, petitioner was represented by court-appointed counsel, Harriette Levitt. Counsel argued that the state prosecutor had committed reversible misconduct; that the verdicts were against the weight of the evidence; and that a new trial was warranted in light of newly discovered evidence, namely, exculpatory statements in the victim's diary. Pet. App. 39a-40a.

b. In April 2002, while his direct appeal was pending, petitioner's counsel (Levitt) filed a notice of postconviction relief in the Arizona Superior Court. Dkt. No. 10-1, at 5-7. Such a notice commences a postconviction proceeding. See Ariz. R. Crim. P. 32.4(a). The Arizona Court of Appeals stayed petitioner's direct appeal pending the conclusion of that postconviction proceeding. Pet. App. 40a.

Although Arizona entitles indigent defendants to appointed counsel for their first postconviction proceeding, see Ariz. R. Crim. P. 32.4(c)(2), petitioner already was represented by the same counsel handling his direct appeal. Under state law, the notice of postconviction relief "must be filed within ninety days after the entry of judgment and sentence or within thirty days after the issuance of the order and mandate in the direct appeal, whichever is the later." Ariz. P. Crim. P. 32.4(a). Petitioner's counsel elected to file the notice within 90 days of the imposition of petitioner's sentence. According to

petitioner (Pet. 4), counsel filed the notice without advising him.

In February 2003, counsel filed a notice informing the court that she had reviewed the record and found no colorable claims for postconviction relief. Pet. App. 4a; see Ariz. R. Crim. P. 32.4(c)(2) ("If counsel determines there are no colorable claims which can be raised on the defendant's behalf, counsel shall file a notice advising the court of this determination."). Counsel requested the full 45 days available under state law for petitioner to file a *pro se* petition. *Ibid.* According to petitioner (Pet. 4), counsel filed that notice without his consent and without informing him of his ability to raise his own claims. In April 2003, after the 45-day period for raising such claims had expired, the Arizona Superior Court dismissed the postconviction proceeding. Pet. App. 4a.

c. In March 2004, following the dismissal of petitioner's first postconviction action, the Arizona Court of Appeals resolved petitioner's direct appeal by affirming his convictions. Pet. App. 40a. The Arizona Supreme Court denied review. *Ibid.*

3. In October 2004, petitioner filed a second notice of postconviction relief in the Arizona Superior Court. After the court denied his request for appointed counsel, petitioner's current counsel filed for relief alleging that trial counsel had been ineffective by failing to present the victim's allegedly exculpatory pretrial statements, to impeach the victim's credibility, and to properly cross-examine the investigating police officer and the State's expert witness on child sexual abuse. In order to excuse his failure to present that ineffective-assistance claim during his initial postconviction proceeding—which was his first opportunity to raise the claim under state law, see *State* v. *Spreitz*, 39 P.3d 525, 527 (Ariz. 2002)—peti-

tioner asserted that his former counsel during that proceeding (Levitt) had herself been ineffective. Pet. App. 41a.

a. The trial court denied relief on two grounds. Pet. App. 68a-75a. First, the court held that petitioner's ineffective-assistance-of-trial-counsel claim was procedurally barred by Arizona Rule of Criminal Procedure 32.2(a), which "preclude[s] * * * relief" on any ground that could have been raised on direct appeal or in any previous postconviction proceeding under Rule 32. See Pet. App. 75a. The court found "that all issues identified by counsel could have been raised in the original" postconviction relief proceeding and "are therefore precluded." *Ibid.*

Second, the court denied the claim on the merits. Having "presided over the trial" and "reviewed the record," the court explained why additional evidence of the victim's recantations would have been cumulative; how trial counsel had effectively cross-examined the State's expert witness on child sexual abuse; and how trial counsel had offered "credible" explanations for the presence of petitioner's semen on the victim's nightgown. Pet. App. 72a-74a. The court concluded that even "if trial counsel had done everything suggested by counsel in this Post Conviction Relief, the result would [not] have changed." *Id.* at 74a.

b. The Arizona Court of Appeals granted review and denied relief. Pet. App. 79a-83a. It agreed with the trial court that petitioner's claim was precluded, because he "could have raised a claim" in his first postconviction proceeding "that trial counsel had been ineffective." *Id.* at 82a. The Arizona Supreme Court denied review. *Id.* at 5a.

4. In April 2008, petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. 2241(a) and 2254(a), contending that his trial counsel had provided ineffective assistance.

a. The magistrate judge recommended that the petition be denied and dismissed with prejudice. Pet. App. 57a-67a. In his view, petitioner "ha[d] not shown cause for, nor prejudice arising from, his procedural default of his ineffective assistance of trial counsel claim," *id.* at 58a, nor had petitioner shown "that review of the merits of his claim is necessary to prevent a fundamental miscarriage of justice or that he is factually innocent of the crimes of conviction," *id.* at 65a. The magistrate judge also determined that, even if petitioner's claim were not procedurally defaulted, it should be denied on the merits because the performance of petitioner's trial counsel had been neither deficient nor prejudicial. *Id.* at 64a-65a.

b. The district court adopted in part the magistrate judge's recommendation. Pet. App. 26a-36a. The court held that "[p]etitioner's ineffective-assistance-of-trial-counsel claim is procedurally defaulted." *Id.* at 33a. The court further held that "[p]etitioner's ineffective-assistance-of-post-conviction-relief counsel claim does not show cause to excuse this procedural default," because "there is no right to post-conviction-relief counsel." *Ibid.* The district court did not reach the merits of petitioner's claim that his trial counsel had provided ineffective assistance. *Id.* at 34a.

c. The court of appeals affirmed. Pet. App. 1a-25a. Petitioner argued that the State's procedural bar was not an adequate and independent state-law ground for denying relief and that in any event he had shown cause to excuse his procedural default. *Id.* at 5a. Resolution of those arguments, the court of appeals reasoned, de-

pended on whether petitioner had a constitutional right to assistance of counsel in his first postconviction proceeding. *Id.* at 8a. Surveying this Court's cases concerning the right to counsel, see *id.* at 10a-23a, the court found "no federal constitutional right to counsel in collateral proceedings, even where those post-conviction proceedings constitute the first opportunity for a criminal defendant to present an ineffective assistance of counsel claim," *id.* at 9a.

SUMMARY OF ARGUMENT

A. For the last half-century, this Court has consistently held that the Sixth and Fourteenth Amendments entitle a criminal defendant to the effective assistance of counsel at trial and during an initial appeal. This Court has repeatedly declined, however, to extend the right to counsel to further proceedings—whether those proceedings were direct or collateral. This Court has thus always determined the existence of a right to counsel with respect to the particular stage of the case at issue. Petitioner's proposed approach—*i.e.*, extending the right to counsel to postconviction proceedings whenever a prisoner raises claims that could not have been raised on direct appeal—would be inconsistent with this Court's categorical approach and more generally with principles of due process and equal protection.

B. Petitioner's proposed exception also would create significant practical difficulties for States and the federal government. First, petitioner's rationale reaches well beyond ineffectiveness claims to many other claims that, for factual or procedural reasons, must be or typically are raised on collateral review. Second, because on petitioner's approach an ineffectiveness claim would secure the assistance of counsel on collateral review,

prisoners would have an overwhelming incentive to argue, among their grounds for collateral relief, that their trial, appellate, and even earlier postconviction counsel had been ineffective. Third, recognizing a right to counsel on collateral review would lead to additional litigation concerning what other constitutional protections apply to those collateral proceedings. Finally, petitioner's proposed exception is unnecessary in light of current state and federal law, which provide in various ways that prisoners with colorable claims of ineffective assistance may obtain appointed counsel.

ARGUMENT

PRISONERS WHO HAVE RECEIVED THE ASSISTANCE OF COUNSEL AT TRIAL AND ON DIRECT APPEAL HAVE NO FEDERAL CONSTITUTIONAL RIGHT TO SUCH COUNSEL ON COLLATERAL REVIEW, EVEN IF COLLATERAL REVIEW IS THE FIRST OPPORTUNITY TO RAISE A PARTICULAR CLAIM OF ERROR

The well-established general rule is that "[t]here is no constitutional right to an attorney in state postconviction proceedings." *Coleman* v. *Thompson*, 501 U.S. 722, 752 (1991). This Court should adhere to that rule, without creating an exception for claims of ineffective assistance of counsel that can be raised for the first time only on collateral review. States can sensibly allocate such claims, which typically require development of a new record, to collateral proceedings without infringing the constitutional right to counsel on a defendant's first appeal as of right.

A. The Sixth And Fourteenth Amendments Require The Effective Assistance Of Counsel During A Criminal Trial And Direct Appeal But Not On Collateral Review

1. This Court has repeatedly held that the right to counsel attaches only to a criminal trial and direct appeal

a. The Sixth Amendment, as applied to the States through the Fourteenth Amendment, provides that the accused "[i]n all criminal prosecutions * * * shall * * * have the Assistance of Counsel for his defence." U.S. Const. Amend. VI. At trial, that constitutional guarantee entitles indigent felony defendants to appointed counsel in either federal or state court. See *Gideon* v. *Wainwright*, 372 U.S. 335, 341 (1963); *Johnson* v. *Zerbst*, 304 U.S. 458, 463 (1938). Once the right to counsel attaches, it applies at all phases of the trial proceedings "where substantial rights of a criminal accused may be affected." *Memphα* v. *Rhay*, 389 U.S. 128, 134 (1967); see *United States* v. *Wade*, 388 U.S. 218, 224 (1967) (right to counsel attaches at "critical" pre-trial stages "where the results might well settle the accused's fate and reduce the trial itself to a mere formality").

The Court has further held, under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, that indigent defendants pursuing their "*first appeal* * * * of right * * * from a criminal conviction" have a right to appointed counsel. *Douglas* v. *California*, 372 U.S. 353, 356 (1963); see *Halbert* v. *Michigan*, 545 U.S. 605, 610 (2005) ("[I]n first appeals as of right, States must appoint counsel to represent indigent defendants," which reflects "both equal protection and due process concerns.") (internal quotation marks omitted). This Court, however, has never extended the right to counsel beyond the initial appeal of a defendant's convic-

tion and sentence. See *Ross* v. *Moffitt*, 417 U.S. 600, 602-603 (1974) (holding that the Fourteenth Amendment does not require the appointment of counsel "for discretionary state appeals" to state supreme courts or "for applications for review in this Court"); *id.* at 609-618.

b. Because a defendant is not entitled to counsel at the latter stages of his criminal case (*i.e.*, a discretionary appeal of his conviction or sentence to a State's highest court or this Court), it follows that he is not entitled to counsel beyond his criminal case, once his conviction and sentence have become final. This Court therefore has repeatedly declined to hold "that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions." *Pennsylvania* v. *Finley*, 481 U.S. 551, 555 (1987). As the Court explained in *Finley*, its decisions in this context from *Douglas* through *Ross* "establish that the right to appointed counsel extends to the first appeal of right, and no further." *Ibid.* Because, the Court continued, "a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori*, he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process." *Ibid.*

The Court also explained in *Finley* why principles of due process and equal protection do not require the appointment of counsel in postconviction proceedings. Collateral review, the Court noted, "is not part of the criminal proceeding itself, and is in fact considered to be civil in nature." *Finley*, 481 U.S. at 557. Because States are not obliged to provide collateral review at all, "the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer" if it elects to make available postconviction remedies. *Ibid.*

Similarly, the Court reasoned that "the equal protection guarantee of 'meaningful access'" does not require appointment of counsel. *Ibid.* Just as the defendant in *Ross* who sought appointed counsel for discretionary review in the state supreme court and this Court already had obtained the benefit of counsel at trial and on direct appeal, so too has a prisoner who requests postconviction relief. *Ibid.* The Court thus concluded that a prisoner's "access to the trial record and the appellate briefs and opinions provide[s] sufficient tools for the *pro se* litigant to gain meaningful access to courts * * * with respect to postconviction review." *Ibid.*

In addition, this Court rejected the premise "that when a State chooses to offer help to those seeking relief from convictions, the Federal Constitution dictates the exact form such assistance must take." *Finley*, 481 U.S. at 559. As the Court explained, "States have substantial discretion to develop and implement programs to aid prisoners" in obtaining postconviction relief, and thus States may make such remedies available "without requiring the full panoply of procedural protections that the Constitution requires be given to defendants who are in a fundamentally different position—at trial and on first appeal as of right." *Ibid.*; see *Ross*, 417 U.S. at 610-611.

c. This Court has never recognized any exception to the rule that appointed counsel is not constitutionally required in postconviction proceedings. To the contrary, the Court has applied that rule to postconviction proceedings in state capital cases, see *Murray* v. *Giarratano*, 492 U.S. 1, 10 (1989) (plurality opinion); *id.* at 14-15 (Kennedy, J., concurring in the judgment), and has repeatedly reaffirmed since *Finley* that prisoners have no constitutional right to counsel on collateral review.

See *Lawrence* v. *Florida*, 549 U.S. 327, 336-337 (2007); *Mayle* v. *Felix*, 545 U.S. 644, 664 n.8 (2005); *Smith* v. *Robbins*, 528 U.S. 259, 275 (2000); *Coleman*, 501 U.S. at 752; *McCleskey* v. *Zant*, 499 U.S. 467, 495 (1991).[1] The lower courts have likewise uniformly declined to recognize a constitutional right to counsel on collateral review, even when such review is the first opportunity for a prisoner to present a particular claim of error. See, *e.g.*, *Mackall* v. *Angelone*, 131 F.3d 442, 449 & n.13 (4th Cir. 1997) (en banc), cert. denied, 522 U.S. 1100 (1998); *People* v. *Ligon*, 940 N.E.2d 1067, 1078-1079 (Ill. 2010), cert. denied, 131 S. Ct. 1698 (2011); *Gibson* v. *Turpin*, 513 S.E.2d 186, 191 (Ga.), cert. denied, 528 U.S. 946 (1999). Petitioner does not point to a single decision of this Court or of any other court finding a federal constitutional right to counsel in postconviction proceedings.

2. Extending the right to counsel to postconviction proceedings on a case-by-case basis would be inconsistent with this Court's categorical approach

Petitioner asks this Court to recognize for the first time a federal constitutional right to the effective assistance of counsel in certain postconviction proceedings. Specifically, petitioner seeks a constitutional right to the "effective assistance of first-tier post-conviction counsel with respect to any ineffective-trial-counsel claim."

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[1] In *Coleman*, the Court acknowledged the prisoner's argument for "an exception to the rule of *Finley* and *Giarratano* in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction." 501 U.S. at 755. The Court did not need to address that argument, however, because the prisoner there did not challenge the effectiveness of counsel in his state habeas proceeding. *Ibid.* Rather, the Court "need[ed] to decide only whether [the prisoner] had a constitutional right to counsel on appeal from the state habeas trial court judgment," and it "conclude[d] that he did not." *Ibid.*

Br. 16; see *id.* 16-19, 23 & n.4. Petitioner's proposed exception, however, is contrary to this Court's consistent practice of determining the right to counsel in criminal cases categorically based on the stage of the proceeding at issue, not case-by-case based on the nature of the claims asserted in that proceeding.

a. For the last half-century, this Court's decisions concerning the right to counsel under the Sixth and Fourteenth Amendments "have been categorical holdings as to what the Constitution requires with respect to a particular stage of a criminal proceeding in general." *Giarratano*, 492 U.S. at 12 (plurality opinion). It was not always so. Under *Betts* v. *Brady*, 316 U.S. 455 (1942), this Court formerly considered on a case-by-case basis whether the absence of counsel had violated the Fourteenth Amendment's guarantee of fundamental fairness. *Id.* at 472-473. The Court, however, rejected that approach in *Gideon*, 372 at 340-345, and indeed "it was the Court's dissatisfaction with the case-by-case approach of *Betts* * * * that led to the adoption of the categorical rule requiring appointed counsel for indigent felony defendants in *Gideon*." *Giarratano*, 492 U.S. at 12 (plurality opinion); see *id.* at 17 (Stevens, J., dissenting).

The Court likewise has applied a categorical approach in determining whether certain pretrial proceedings constitute "critical stages" that require the assistance of counsel. *Wade*, 388 U.S. at 227. In *Wade*, for instance, the Court concluded that a witness's pretrial lineup identification of a defendant categorically constitutes a critical stage requiring the assistance of counsel. *Id.* at 228-233. The Court reached the opposite conclusion in *United States* v. *Ash*, 413 U.S. 300 (1973), holding that a witness's pretrial photographic identification of a

defendant is not such a critical stage, *id.* at 321; again, however, the Court did so categorically, without regard to the facts of any particular identification. And the Court reached the same conclusion for sentencings, regardless of the issues at stake. See *Mempha*, 389 U.S. at 134 (holding that the right to counsel attaches at sentencing in light of "the critical nature of sentencing in a criminal case"). Thus, in determining whether a right to counsel exists in criminal cases, the Court has focused on the stage of the case at issue, not on the circumstances of that stage in any given case.[2]

b. Petitioner rests his position (Br. 16-19, 23-27) on this Court's decisions in *Douglas*, *supra*, and *Halbert*, *supra*. Those decisions, however, adhere to exactly the categorical, stage-based approach that petitioner eschews. In *Douglas*, this Court held that indigent defendants pursuing their "first appeal * * * of right" from a criminal conviction are constitutionally entitled to the representation of counsel. 372 U.S. at 356 (emphasis omitted). The California rule in *Douglas* provided for the appointment of counsel if a state appellate court determined from reviewing the record that counsel would be helpful in presenting a defendant's claims. *Id.* at 355.

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[2] The Court has held that a defendant charged with a misdemeanor has a right to appointed counsel only when the defendant is sentenced to actual imprisonment. See *Alabama* v. *Shelton*, 535 U.S. 654, 657 (2002). That rule depends on the sentence imposed, but it draws a categorical line for prison sentences. In contrast, the Court has adopted a case-by-case inquiry for determining whether the Fourteenth Amendment's Due Process Clause requires the appointment of counsel in parole or probation revocation proceedings. See *Gagnon* v. *Scarpelli*, 411 U.S. 778, 788-790 (1973); see also *Turner* v. *Rogers*, 131 S. Ct. 2507, 2516-2517 (2011). Petitioner correctly does not contend that postconviction relief proceedings are analogous for appointment-of-counsel purposes to parole or probation revocation proceedings.

That practice was inadequate, the Court reasoned, because a nonindigent defendant could retain counsel and ensure that "the appellate court passes on the merits of his case only after having the full benefit of written briefs and oral argument by counsel." *Id.* at 356. By contrast, for an indigent defendant "the appellate court [was] forced to prejudge the merits" of the case on a "barren record" before the court "[could] even determine whether counsel should be provided." *Ibid.*

The Court specifically noted, however, that its holding "did not extend beyond *the stage in the appellate process* at which the claims have once been presented by a lawyer and passed upon by an appellate court." 372 U.S. at 356 (emphasis added); see *Finley*, 481 U.S. at 555 ("Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further."). Prisoners like petitioner who seek postconviction relief stand in a far different circumstance than indigent defendants pursuing an initial appeal of right. Such prisoners have had the benefit of counsel at trial and on appeal, and thus they have "access to the trial record and the appellate briefs and opinions" in order to pursue collateral relief. *Id.* at 557. They are not pursuing their "*one and only appeal* * * * as of right." *Douglas*, 372 U.S. at 357 (emphasis added).

Petitioner's reliance on *Halbert* is equally misplaced. In that case, the Court considered whether "the Due Process and Equal Protection Clauses require the appointment of counsel for defendants, convicted on their pleas, who seek access" to first-tier discretionary review in a state appellate court. 545 U.S. at 610. The Court recognized that the question was one of "classification," *i.e.*, whether Michigan's system of discretionary first-tier appellate review required the appointment of coun-

sel under *Douglas* (because it was the initial opportunity for an appellate court to review a defendant's conviction and sentence) or did not require the appointment of counsel under *Ross* (because appellate review was discretionary rather than of right). *Id.* at 609-610; see *id.* at 628 (Thomas, J., dissenting) ("Michigan's system bears some similarity to the state systems at issue in both *Douglas* and *Ross*."). The Court concluded that *Douglas* controlled, reasoning that the "intermediate appellate court looks to the merits" of defendants' claims and "indigent defendants pursuing first-tier review * * * are generally ill equipped to represent themselves." *Id.* at 617.

Again, however, the Court's reasoning and result were categorical. It held that counsel must be appointed for all plea-convicted defendants who request first-tier, discretionary appellate review, without regard to the nature of the claims that those defendants seek to raise on appeal. And the Court rested its holding on the fact that "[a] first-tier review applicant, forced to act *pro se*, will face a record unreviewed by appellate counsel, and will be equipped with no attorney's brief prepared for, or reasoned opinion by, a court of review." *Halbert*, 545 U.S. at 619. Indeed, the Court specifically contrasted that situation with *Ross*, because "a defendant seeking State Supreme Court review following a first-tier appeal as of right earlier had the assistance of appellate counsel." *Ibid.* Thus, as the Court explained, "[t]he attorney appointed to serve at the intermediate appellate court level will have reviewed the trial court record, researched the legal issues, and prepared a brief reflecting that review and research," and in addition "[t]he defendant seeking second-tier review may also be

armed with an opinion of the intermediate appellate court addressing the issues counsel raised." *Ibid.*

The contrast that the Court drew in *Halbert* between "first-tier" and "second-tier" review is significant for two reasons. As an initial matter, the Court defined those "tier[s]" by looking to the stage of the appellate proceeding at issue, *i.e.*, whether the defendant was seeking review in an intermediate appellate court (first-tier review) or a state supreme court (second-tier review). The Court did not describe first-tier and second-tier review as claim-specific, depending on whether a particular claim had been previously reviewed by an appellate court. A defendant who is represented by counsel during a first-tier appeal as of right, and who then requests discretionary review by a state supreme court, is seeking second-tier review—even if he raises new claims in his state supreme court petition. This Court has never suggested that the right to counsel can attach to some claims (but not others) at a given stage of a criminal proceeding. Rather, the Court has always found that the right to counsel attaches to some stages (but not others) of the criminal proceeding itself.

Moreover, prisoners seeking postconviction relief are more similarly situated to defendants seeking second-tier than first-tier appellate review. Such prisoners are not seeking "the first, and likely the only, direct review the defendant's conviction and sentence will receive." *Halbert*, 545 U.S. at 619; see *Douglas*, 372 U.S. at 357. To the contrary, such prisoners already have received the benefit of appointed counsel following a first-tier appeal and they may have received second-tier appellate review as well. As a result, such prisoners face collateral review armed at a minimum with the trial record, counsel's appellate briefing, and the disposition of the

case by the state intermediate court. Although Arizona prisoners must present one category of claims—that their trial counsel were ineffective—on collateral review, they still stand in a far different position than indigent defendants seeking first-tier review of their convictions and sentences. See *Halbert*, 545 U.S. at 619-620.

3. Due process and equal protection principles do not support extending the right to counsel to postconviction proceedings that are the first opportunity for a prisoner to raise a particular claim of error

Petitioner does not contend that a prisoner seeking postconviction relief is similarly situated as a general matter to an indigent defendant seeking first-tier review of his conviction and sentence. Rather, petitioner contends (Br. 19) that he is similarly situated with respect to the one claim of error (*i.e.*, ineffectiveness of trial counsel) that he was required to raise on collateral review under state law. In other words, petitioner asserts "a due process/equal protection right to counsel" that attaches—claim-by-claim—to any claim raised on collateral review that could not have been previously presented with the assistance of counsel to an appellate court. *Id.* at 19-20, 23. As explained above, that rule is not grounded in any of this Court's precedents concerning the right to counsel. Nor is it grounded more generally in either due process or equal protection principles.

a. Beyond a criminal defendant's initial appeal, the Due Process Clause requires only that a State's procedures "comport[] with fundamental fairness." *Finley*, 481 U.S. at 556. As the Court explained in *Finley*, because States are not required to provide postconviction procedures, fundamental fairness does not oblige States to appoint counsel as part of any such procedures that it

does provide. *Id.* at 557 ("States have no obligation to provide [collateral] relief, and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well.") (internal citation omitted); cf. *Ross*, 417 U.S. at 611 ("The fact that an appeal *has* been provided does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way."). "Unfairness results," the Court explained in *Ross*, "only if indigents are singled out by the State and denied meaningful access to the appellate system," a question that "is more profitably considered under an equal protection analysis." *Ibid.*

b. Under that analysis, a State must ensure that indigent defendants "have an adequate opportunity to present their claims fairly" within a system of review that is "free of unreasoned distinctions." *Ross*, 417 U.S. at 612 (quoting *Rinaldi* v. *Yeager*, 384 U.S. 305, 310 (1966)); see *Douglas*, 372 U.S. at 356 ("[A] State can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an invidious discrimination.") (internal quotation marks omitted). As the Court recognized in both *Finley* and *Halbert*, a State does not act arbitrarily in distinguishing, for purposes of the right to counsel, between a defendant's initial appeal and subsequent proceedings. *Finley*, 481 U.S. at 557; *Halbert*, 545 U.S. at 619. A prisoner initially requesting collateral relief, like a defendant initially appealing his conviction or sentence, may present a claim that has not yet been subject to appellate review, but the prisoner is not "as ill equipped * * * to represent himself in investigating and presenting such a claim." Pet. Br. 18. The prisoner has already obtained what "the defendants in

Douglas and *Halbert*" had not—namely, the benefit of a counseled direct appeal. *Ibid.*

Petitioner argues (Br. 18-19, 26) that because under state law the direct appeal will not have addressed a claim that trial counsel was ineffective, counsel necessarily would be helpful in developing such a claim. The Court recognized in *Ross*, however, that counsel would "prove helpful" in preparing petitions for discretionary review and thus that indigent defendants were "somewhat handicapped" by proceeding without counsel. 417 U.S. at 616. But that "relative handicap," the Court reasoned, was "far less than the handicap borne by the indigent defendant denied counsel on his initial appeal as of right in *Douglas*." *Ibid.* Similarly here, the likelihood that counsel would aid in the presentation of ineffectiveness claims on collateral review "does not mean that the service is constitutionally required." *Ibid.*; cf. *Lewis* v. *Casey*, 518 U.S. 343, 354 (1996) (noting that the Constitution does not require "permanent provision of counsel").

Petitioner contends that prisoners cannot use the trial record to present ineffectiveness claims, because such claims "typically depend on non-record evidence (such as testimony by trial counsel, or by fact or expert witnesses who were not called at trial)." Br. 19. But that is precisely why a State may decide that ineffectiveness claims are better resolved in collateral proceedings, where prisoners have never had a constitutional right to counsel. As petitioner recognizes (*ibid.*), direct review permits a prisoner to present claims of error based on the record developed at trial. Appellate courts typically do not resolve claims based on facts outside the record—a practice as familiar now as at the time of *Douglas*, *Ross*, and *Finley*. By contrast, collateral review

generally permits the prisoner to present new claims—such as claims involving the ineffectiveness of counsel or the failure to disclose material exculpatory evidence—that typically are not based on the trial record. See Resp. Br. 19. Those types of claims by their nature represent a collateral attack on the direct proceedings, and thus they have traditionally been brought in postconviction proceedings where no constitutional right to the effective assistance of counsel has ever been recognized.[3]

This Court's decision in *Massaro* v. *United States*, 538 U.S. 500 (2003), demonstrates why requiring adjudication of ineffectiveness claims on collateral review is not arbitrary for equal protection purposes. As this Court explained in *Massaro* with respect to federal prisoners, collateral review "is preferable to direct appeal for deciding claims of ineffective assistance." *Id.* at 504. Returning the case to the trial court allows for preparation of a record containing "the facts necessary to determining the adequacy of representation during an entire trial," and ordinarily allows for the claim's resolution by the "district judge who presided at trial * * * [and who] should have an advantageous perspective for determining the effectiveness of counsel's conduct and whether any deficiencies were prejudicial." *Id.* at 505-506; see

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[3] Petitioner is correct (Br. 25) that a defendant could elect to proceed simultaneously with a direct appeal and collateral review. But that decision does not alter the constitutional analysis: the defendant has a right to counsel in his direct appeal but not in any collateral proceeding, whatever the sequencing of those stages of the case. Here, for instance, petitioner proceeded simultaneously with a direct appeal and collateral review, although he could have initiated his first postconviction relief proceeding "within thirty days after the issuance of the order and mandate in the direct appeal." Ariz. R. Crim. P. 32.4(a).

id. at 505 ("The court may take testimony from witnesses for the defendant and the prosecution and from the counsel alleged to have rendered the deficient performance.").

The Court in *Massaro* reached the conclusion that "in most cases a motion brought under [28 U.S.C.] 2255 is preferable to direct appeal for deciding claims of ineffective assistance," 538 U.S. at 504, even though federal prisoners are not guaranteed the assistance of counsel in Section 2255 proceedings, see 18 U.S.C. 3006A(a)(2)(B) (providing for the appointment of counsel if "the interests of justice so require"). States—which need not provide postconviction procedures at all and which retain "substantial discretion to develop and implement" such procedures, *Finley*, 481 U.S. at 559—are entitled to adopt the same system as Congress and this Court. Although States may not deprive defendants of an adequate opportunity to challenge their convictions or sentences by arbitrarily channeling claims into postconviction proceedings, petitioner correctly does not allege that is what Arizona did here. To the contrary, Arizona provided petitioner with adequate direct review and reasonably required petitioner to raise his claim of ineffective assistance on collateral review.

B. Extending The Right To Counsel To Certain Postconviction Proceedings Would Create Serious And Unnecessary Administrative Difficulties

In addition to being inconsistent with this Court's cases and principles of due process and equal protection, petitioner's proposed exception—*i.e.*, extending the right to counsel to collateral review for claims that could not have been raised on direct appeal—would create

significant practical difficulties for States and the federal government that petitioner largely fails to address.

1. Petitioner's proposed exception would reach well beyond claims of ineffective assistance of trial counsel.

a. Petitioner insists (Br. 16, 18-19) that his proposed exception is a narrow one: a right to effective assistance of postconviction counsel only with respect to a claim that trial counsel was ineffective, and even then only when state law requires such a claim to be raised on collateral review. But petitioner's rationale extends far beyond claims that trial counsel was ineffective. According to that rationale, the right to counsel attaches to any claim challenging a defendant's conviction or sentence that could not previously have been subject to appellate review. See *id.* at 18-19, 23; *id.* at 19 ("[I]n Arizona a first post-conviction relief proceeding effectively serves as the first appeal for any ineffective-assistance-of-trial-counsel claim."). If that rationale were correct, a right to counsel would attach to a host of other claims that, for factual or procedural reasons, must be or typically are raised on collateral rather than direct review.

For instance, a defendant's claim that *appellate* counsel was ineffective cannot be raised until that appeal has concluded. Similarly, claims of alleged violations of *Brady* v. *Maryland*, 373 U.S. 83 (1963), "may not surface until after the direct review is complete." *Giarratano*, 492 U.S. at 24 (Stevens, J., dissenting). In addition, commentators have advanced petitioner's same rationale in arguing that a right to counsel attaches to claims based on constitutional rules that this Court announces after a defendant's conviction and sentence have become final. See Emily Garcia Uhrig, *A Case for a Constitutional Right to Counsel in Habeas Corpus*,

60 Hastings L.J. 541, 579 (2009); 1 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice & Procedure* § 7.2e (6th ed. 2011). If petitioner were to prevail in this case, it would portend years of litigation over a question that is currently settled, *i.e.*, the extent to which a right to counsel extends beyond a defendant's trial and direct appeal.

b. The breadth of petitioner's proposed exception is highlighted by the real-world consequences of appointing counsel. Petitioner does not propose that counsel represent a prisoner in postconviction proceedings only with respect to the prisoner's ineffectiveness-of-trial-counsel claim. Rather, appointed counsel would represent a prisoner with respect to *all* of his claims and thus would generally aid the prisoner in his request for collateral relief. On petitioner's apparent view, postconviction counsel could expand a petition to include defaulted claims excused by the ineffective assistance of counsel, see *Edwards* v. *Carpenter*, 529 U.S. 446, 451 (2000), or "winnow[] out weaker arguments" and focus on stronger claims, *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983); see, *e.g.*, *Dodd* v. *United States*, 614 F.3d 512, 514 (8th Cir. 2010) (appointed counsel filed amended postconviction motion that narrowed and organized *pro se* claims). An ineffectiveness claim therefore would become a gateway to counsel for collateral review more generally.

2. Petitioner's proposed exception would generate extensive additional litigation on the effectiveness of trial, appellate, and postconviction counsel

a. Because on petitioner's approach an ineffectiveness claim would secure the assistance of counsel on collateral review, prisoners would have an overwhelming

incentive to argue, among their grounds for collateral relief, that their counsel at trial and on direct appeal had been ineffective. Claims of ineffective assistance have long been among the most common claims raised by state prisoners in both state and federal habeas proceedings. See Roger A. Hanson & Henry W.K. Daley, U.S. Dep't of Justice, *Federal Habeas Corpus Review: Challenging State Court Criminal Convictions* 7 (1995) (Hanson); Victor E. Flango, *Habeas Corpus in State and Federal Courts* 47 (1994) (Flango). Recent research indicates that half of federal habeas petitions by state prisoners include an ineffective-assistance claim. See Nancy J. King et al., *Final Technical Report: Habeas Litigation in U.S. District Courts* 28 (2007) (King); Flango 47.[4] Petitioner's proposed exception would thus be anything but narrow, and it would only grow broader if raising an ineffectiveness claim carried with it the right to counsel. Simply put, petitioner's exception would swallow the rule that "[t]here is no constitutional right to an attorney in state post-conviction proceedings." *Coleman*, 501 U.S. at 752 (citations omitted).

b. Nor will the additional litigation be limited to the effectiveness of prisoners' trial and appellate counsel. Prisoners will also challenge the effectiveness of their postconviction counsel. Just as petitioner argues that he

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[4] These studies examine federal habeas petitions filed by state prisoners under 28 U.S.C. 2254. Similar evidence examining federal postconviction motions filed by federal prisoners under 28 U.S.C. 2255 (2006 & Supp. III 2009) is not readily available. If anything, however, these studies underestimate the frequency with which federal prisoners raise claims of ineffective assistance, in light of *Massaro* and the fact that law-of-the-case principles bar claims from being relitigated in most Section 2255 proceedings, see *Davis* v. *United States*, 417 U.S. 333, 342 (1974).

has a constitutional right to effective counsel in his "first state postconviction proceeding because that is the first forum in which the ineffectiveness of trial counsel can be alleged," other prisoners will claim the same right in a *second* state postconviction proceeding—because that will be "the first forum" in which they can challenge the effectiveness of their first postconviction counsel. *Bonin* v. *Vasquez*, 999 F.2d 425, 429 (9th Cir. 1993). That logic knows no end: prisoners can claim a right to counsel in any postconviction proceeding by challenging the effectiveness of their previous postconviction counsel. Petitioner's approach thus raises the specter "of an infinite continuum of litigation in many criminal cases." *Ibid.*; see *Breard* v. *Netherland*, 949 F. Supp. 1255, 1266 (E.D. Va. 1996), aff'd, 134 F.3d 615 (4th Cir.), cert. denied, 523 U.S. 371 (1998).

Petitioner acknowledges that this risk of protracted litigation exists "in the abstract," although he attempts to identify "theoretical and pragmatic reasons" why the risk will not come to pass. Br. 29. None withstands scrutiny. Petitioner argues that there is no right to counsel in a second postconviction proceeding because that would require "second-tier review of the underlying ineffective-trial-counsel claim." Br. 30. But on petitioner's theory, what matters for appointment-of-counsel purposes is whether a postconviction proceeding is the initial opportunity to raise a particular "claim," *i.e.*, "an asserted federal basis for relief from a state court's judgment of conviction." *Gonzalez* v. *Crosby*, 545 U.S. 524, 530 (2005). A second postconviction proceeding would be the initial opportunity for a prisoner to assert as a "basis for relief" that his first postconviction counsel had been ineffective (by failing to argue, in turn, that the prisoner's trial or appellate counsel had been inef-

fective, which would be the basis for setting aside the state court judgment). Petitioner therefore lacks any principled basis for cutting off the continuum after the first stage of postconviction proceedings.

Petitioner argues that even if litigation *ad infinitum* is "theoretically possible," it is not practically likely because prisoners will have difficulty securing counsel or their requests for relief will be barred by state or federal restrictions on the availability of postconviction relief. Br. 32-34. The former point provides no limit if, as explained above, the logic of petitioner's position would require the appointment of counsel. Whether the latter point is of consequence depends on a number of legal questions that petitioner leaves unanswered. For instance, petitioner does not address whether a habeas application that claims ineffective assistance of first postconviction counsel qualifies as a "second or successive" application under 28 U.S.C. 2244(b) or similarly-worded state provisions—even though that claim could not have been raised in the first habeas application. And as petitioner recognizes, the one-year federal statute of limitations in 28 U.S.C. 2244(d) "is tolled while a timely-initiated state post-conviction relief proceeding is pending," Br. 35, which diminishes the force of petitioner's argument that state or federal statutes of limitations will prevent his new constitutional rule from being overly burdensome in practice.

3. Petitioner's proposed exception also would generate additional litigation on the constitutionality of postconviction procedures

Although petitioner argues that state statutes of limitations will mitigate the practical consequences of his new constitutional rule, elsewhere he states that "one

would hope *and expect* that Arizona will amend [its] time limit for the commencement of a second post-conviction proceeding to challenge the effectiveness of first post-conviction counsel." Br. 33 n.11 (emphasis added). Petitioner's expectation highlights that recognizing even a limited right to counsel on collateral review would require this Court to decide what other constitutional protections apply to those collateral proceedings. In *Finley*, for instance, the Court held that state-appointed postconviction counsel was not required to comply with the procedures set forth in *Anders* v. *California*, 386 U.S. 738 (1967), but the Court's holding in *Finley* was predicated on finding no underlying constitutional right to counsel in postconviction proceedings generally. See 481 U.S. at 555-556. To the extent that the right to counsel attaches to collateral review, prisoners will contend that postconviction counsel must adhere to the *Anders* framework.

Likewise, some States and the federal government require that courts screen postconviction petitions for frivolity before appointing counsel. See *infra*, p. 31. Petitioner does not say whether such procedures would survive constitutional scrutiny. But he does rely heavily (Br. 16-19, 23-27) on this Court's decision in *Douglas*, which invalidated a California law providing for the appointment of counsel only if a state appellate court determined from reviewing the record that counsel would be helpful in presenting a defendant's claims. 372 U.S. at 355-356. Petitioner's rule thus would invite litigation over considered legislative judgments about the nature of counsel's role on collateral review.

At the least, petitioner's proposed rule would encourage States to alter their postconviction procedures in ways adverse to prisoners. For instance, petitioner con-

tends (Br. 18, 27) that the present case is similar to *Douglas* and *Halbert*, because Arizona trial courts consider requests for postconviction relief on their merits. That suggests a different result if a State were to make postconviction review turn on factors other than simply the merits of requests for relief. More importantly, although Arizona appoints counsel as of right for the first postconviction proceeding, other States appoint counsel only in certain circumstances—as, for instance, upon a showing that the prisoner has a substantial or nonfrivolous claim. Faced with the choice between allocating further scarce resources to collateral review and diminishing or even eliminating the opportunity for prisoners to obtain such review, States might choose the latter.[5]

4. Petitioner's proposed exception is unnecessary in light of current state and federal law

a. Petitioner suggests that in the absence of a right to counsel for "first-tier review of any federal constitutional claim," States could channel all such claims into

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[5] Petitioner incorrectly argues (Br. 20) that prisoners would be better off if States eliminated postconviction review, because then prisoners could proceed to federal habeas without facing problems of exhaustion or procedural default. Arizona law, however, provides all prisoners with the right to appointed counsel for an initial postconviction proceeding; federal law does not. Prisoners like petitioner thus unquestionably would be harmed, and prisoners in other States would not be helped: they would have to do the same thing in federal habeas as in state habeas, *i.e.*, litigate ineffectiveness claims without guaranteed assistance from counsel. Petitioner points (*ibid.*) to the restrictive standards for federal habeas corpus review of claims previously adjudicated in state court. Although those standards would not apply if a State eliminated postconviction review, that State's prisoners still would have to litigate ineffectiveness claims in federal habeas without guaranteed assistanee from counsel.

postconviction proceedings. Br. 24. States have not done so in the last quarter-century, even as this Court and the lower courts have uniformly found no right to counsel on collateral review. That should not be surprising, because States have no incentive to limit direct appeals to state claims and to compel prisoners to seek state and federal collateral review of federal constitutional claims. To the contrary, States have an overriding interest in securing the finality of their criminal convictions. See *Calderon* v. *Thompson*, 523 U.S. 538, 555 (1998) (noting that limits on federal habeas relief reflect "enduring respect for 'the State's interest in the finality of convictions that have survived direct review within the state court system'") (quoting *Brecht* v. *Abrahamson*, 507 U.S. 619, 635 (1993)).

In any event, it is uncertain whether a State with a functioning appellate court system that hears state constitutional claims could validly discriminate against all analogous federal constitutional claims. See *Howlett* v. *Rose*, 496 U.S. 356, 367-374 (1990); *Martinez* v. *California*, 444 U.S. 277, 283 n.7 (1980) ("[W]here the same type of claim, if arising under state law, would be enforced in the state courts, the state courts are generally not free to refuse enforcement of the federal claim."); but cf. *Haywood* v. *Drown*, 129 S. Ct. 2108, 2118-2133 (2009) (Thomas, J. dissenting) (arguing that, consistent with the Supremacy Clause, a State may place certain federal claims outside the subject-matter jurisdiction of its courts). And although it is certain that a State may not arbitrarily channel claims into postconviction proceedings, see *supra*, pp. 19-22, Arizona has not done that here, and petitioner does not contend otherwise.

b. Petitioner also suggests (Br. 35) that absent a right to counsel, Arizona defendants will be left without

an adequate remedy for the ineffective assistance of trial counsel. In fact, Arizona appoints counsel to all indigent defendants for their first post-conviction proceeding. Ariz. R. Crim. P. 34.2(c)(2). Many other States do the same. See, *e.g.*, Alaska Stat. 18.85.100(c) (2010); Conn. Gen. Stat. Ann. § 51-296(a) (West 2005); Me. R. Crim. P. 69, 70(c); N.C. Gen. Stat. § 7A-451(a)(2) (2007); N.J. Ct. R. 3:22-6(b); R.I. Gen. Laws § 10-9.1-5 (1997); Tenn. Code Ann. § 8-14-205 (2002). Other States appoint counsel upon a showing that the prisoner has a substantial or nonfrivolous claim, see, *e.g.*, Kan. Stat. Ann. § 22-4506 (1995); N.M. Dist. Ct. R. Crim. P. 5-802; *Jensen* v. *State*, 688 N.W.2d 374, 378 (N.D. 2004); or if an evidentiary hearing or discovery is necessary, see Ky. R. Crim. P. 11.42(5); La. Code Crim. Proc. Ann. art. 930.7(C) (1990); Mich. R. Crim. P. 6.505(A); S.C. R. Civ. P. 71.1(d). Even in States that do not automatically provide counsel for postconviction proceedings in certain circumstances, counsel may be appointed at the discretion of the trial court or the Public Defender. See, *e.g.*, Ala. Code § 15-12-23 (LexisNexis Supp. 2010); Ark. R. Crim. P. 37.3(b); Idaho Code Ann. § 19-4904 (2004); Ind. R. Post Conviction Remedies 1 § 9(a); Mass. R. Crim. P. 30(c)(5); Neb. Rev. Stat. Ann. § 29-3004 (LexisNexis 2009); Wash. R. App. Proc. 16.15(h).[6] As those laws demonstrate, States provide various ways in which prisoners with colorable claims of ineffective assistance can obtain counsel on collateral review. Petitioner does not even attempt to show that his one-size-fits-all constitutional mandate is necessary in order to ensure that pris-

[6] Two States have not clearly addressed whether counsel may be discretionarily appointed in postconviction proceedings in certain circumstances. See *Willis* v. *Price*, 353 S.E. 2d 488, 489 (Ga. 1987); *Morris* v. *State*, 765 N.W.2d 78, 81 (Minn. 2009).

oners with colorable claims of ineffective assistance obtain adequate judicial review.

At the federal level, district courts may appoint counsel whenever "the interests of justice so require," 18 U.S.C. 3006A(a)(2)(B), and they must do so whenever an evidentiary hearing is ordered or it is necessary for effective discovery, see Rules 6(a) and 8(c), *Rules Governing Section 2254 Cases in the United States District Courts*; Rules 6(a) and 8(c), *Rules Governing Section 2255 Proceedings For The United States District Courts*. It is true that federal courts appoint counsel in relatively few postconviction proceedings, and thus the bulk of federal prisoners pursue collateral relief *pro se*. See Hanson 14; Flango 47; Richard Faust, *The Great Writ in Action: Empirical Light on the Federal Habeas Corpus Debate*, 18 N.Y.U. Rev. L. & Soc. Change 637, 688 (1991). But that is because the vast majority of federal prisoners do not present colorable claims for relief. Indeed, recent research indicates that fewer than one percent of federal habeas petitions filed by state prisoners are successful. See King 9.[7]

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[7] The rate of success in capital cases is significantly higher: approximately twelve percent of habeas petitions in capital cases are successful. See King 10. All but seven States recognize a right to counsel for the first postconviction proceeding in capital cases. See 1 Donald E. Wilkes, Jr., *State Postconviction Remedies and Relief* § 1:5 (2010). Of those seven States, two do not permit capital punishment, and the remaining five States appoint counsel for postconviction review in capital cases in the same circumstances that they appoint counsel for such review in noncapital cases. See Ala. Code § 15-12-23 (LexisNexis Supp. 2010); Del. Super. Ct. R. Crim. P. 61(e)(1); *Willis* v. *Price*, 353 S.E.2d 488, 489 (Ga. 1987); Neb. Rev. Stat. Ann. § 29-3004 (LexisNexis 2009); *State* v. *Hall*, 908 A.2d 766, 770 (N.H. 2006). Petitioner does not contend that capital defendants lack legal representation in postconviction proceedings, including their initial requests for postconviction relief.

Petitioner's approach therefore promises a dramatic shift of resources to state and federal habeas review, without any showing of a corresponding benefit to the postconviction review system. See Nancy J. King & Joseph L. Hoffmann, *Envisioning Post-Conviction Review for the Twenty-First Century*, 78 Miss. L. J. 433, 437 (2008) (arguing based on recent statistical evidence that "[t]he cost of post-conviction review squanders [scarce] state and federal criminal justice dollars, instead of spending them where they are needed most"). Services for indigent defendants are already stretched thin, see, *e.g.*, Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 Harv. L. Rev. 1731, 1731, 1733-1735 (2005), and postconviction filings have steadily increased for the last three decades, see, *e.g.*, John Scalia, U.S. Dep't of Justice, *Prisoner Petitions Filed in U.S. District Courts, 2000, with Trends 1980-2000* 2 tbl. 1 (2002); Administrative Office of U.S. Courts, *Judicial Business of the United States Courts* 144-145 tbl. C-2 (2010). Petitioner's proposed exception is thus not simply unnecessary but unwise.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LANNY A. BREUER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
JEFFREY B. WALL
Assistant to the Solicitor General
SCOTT A.C. MEISLER
Attorney

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AMICUS CURIAE BRIEF

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No. 10-1001

IN THE

Supreme Court of the United States

LUIS MARIANO MARTINEZ,
Petitioner,

v.

CHARLES L. RYAN, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Of Counsel:
CLAUDIA WILSON FROST
LEE KOVARSKY
ELI BURRISS
DAWN JENKINS
HAROUT SAMRA

WILLIAM T. ROBINSON III
Counsel of Record
President
AMERICAN BAR ASSOCIATION
321 North Clark Street
Chicago, IL 60610
(312) 988-5000
abapresident@americanbar.org

Counsel for Amicus Curiae
American Bar Association

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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QUESTION PRESENTED

Whether a defendant in a state criminal case who is prohibited by state law from raising on direct appeal any claim of ineffective assistance of trial counsel, but who has a state-law right to raise such a claim in a first post-conviction proceeding, has a federal constitutional right to effective assistance of first post-conviction counsel specifically with respect to his ineffective-assistance-of-trial-counsel claim?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
RECOGNITION OF A RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT A DEFENDANT'S FIRST OPPORTUNITY TO BRING AN INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIM IS PARAMOUNT FOR THE PROTECTION OF THE RIGHT TO A FAIR TRIAL	5
A. Effective Representation At The First Proceeding In Which A Trial-Phase IAC Claim May Be Presented Ensures Review Will Be Based On A Robust Record	5
B. Effective Representation At The First Proceeding In Which A Trial-Phase IAC Claim May Be Brought Is Necessary In Light Of Procedural And Other Errors That Can Preclude Review	8
C. Even If A Defendant Obtains Federal Merits Review, An Inadequately-Constructed State Record Limits The Factual Basis On Which A Federal Court May Grant Relief	10
CONCLUSION	11

TABLE OF AUTHORITIES

CASES	Page
Archer v. *State*, 986 So. 2d 951 (Miss. 2008)	6
Artuz v. *Bennett*, 531 U.S. 4 (2000)	10
Cullen v. *Pinholster*, 131 S. Ct. 1388 (2011)	4, 11
Douglas v. *California*, 372 U.S. 353 (1963)	5, 8
Halbert v. *Michigan*, 545 U.S. 605 (2005)	5, 6
Kimmelman v. *Morrison*, 477 U.S. 365 (1986)	7
Padilla v. *Kentucky*, 130 S. Ct. 1473 (2010)	3
Rompilla v. *Beard*, 545 U.S. 374 (2005)	3
Rose v. *Lundy*, 455 U.S. 509 (1982)	9-10
State v. *Parrott*, 811 A.2d 705 (Conn. 2003)	6
Strickland v. *Washington*, 466 U.S. 668 (1984)	3, 5
Walker v. Martin, 131 S. Ct. 1120 (2011)	9
STATUTES	
28 U.S.C. § 2244(d)(2)	10
28 U.S.C. § 2254(d)	10

TABLE OF AUTHORITIES—Continued

	Page
28 U.S.C. § 2254(d)(1)	10, 11
28 U.S.C. § 2254(d)(2)	10
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-222, 100 Stat. 1214	4, 10
RULES	
S. Ct. R. 37.3	1
S. Ct. R. 37.6	1
OTHER AUTHORITIES	
ABA Mission and Association Goals, http://www.abanet.org/about/goals.html	2
ABA Standards and a history of their development, http://www.americanbar.org/groups/criminal_justice/policy/standards.html	2
ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION (ABA 3d ed. 1993)	7, 8
Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 CRIM. JUST. 10, 14-15 (Winter 2009)	2
Randy Hertz and James C. Leibman, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 11.2 (6th ed. 2011)	7

INTEREST OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* [1]

Pursuant to Supreme Court Rule 37.3, the American Bar Association ("ABA"), as *amicus curiae*, respectfully submits this brief in support of the Petitioner. The ABA requests that, in determining whether a defendant has a constitutional right to effective assistance of counsel during a defendant's first opportunity to assert a claim of ineffective assistance of trial counsel, the Court consider the critical protections afforded by effective first post-conviction counsel.[2]

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. Its nearly 400,000 members span all 50 states and other jurisdictions, and include attorneys in private law firms, corporations, non-profit organizations, government agencies, and prosecutor and public defender offices. They also include judges, legislators, law professors, and law students.[3] Since its inception,

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court.

[2] Because the Question Presented uses the term "defendant," the ABA also does so, but notes that an individual may have other designations in relevant text or citations, including petitioner, appellant, applicant and inmate, based on the phase of a criminal prosecution.

[3] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No member of the ABA Judicial Division Council participated in

and as one of the cornerstones of its mission, the ABA has actively sought to improve the quality of American legal services by "[p]romot[ing] competence, ethical conduct and professionalism."[4] In particular, the ABA has long been committed to the provision of competent counsel in criminal and related proceedings.

The ABA STANDARDS FOR CRIMINAL JUSTICE ("ABA Standards") are among the ABA's most prominent efforts to improve the quality of the criminal justice system. Begun in 1964 under the aegis of then-ABA President (and later Justice) Lewis Powell, and developed and refined over the last forty years, the ABA Standards represent a collection of "best practices" based on the consensus views of a broad array of professionals involved in the criminal justice system.[5]

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the preparation of this brief, or in the adoption or endorsement of the positions in it.

[4] ABA Mission and Association Goals, *available at* http://www.abanet.org/about/goals.html.

[5] The ABA Standards are developed through the efforts of broadly representative task forces made up of prosecutors, judges, defense lawyers, academics, the public and other groups that may have a special interest in the subject, as well as by the diverse membership of the ABA. Before they become official ABA policy they must be approved by vote of the ABA House of Delegates ("HOD"). The HOD is composed of more than 550 representatives from states and territories, state and local bar associations, affiliated organizations, ABA sections, divisions and members, and the Attorney General of the United States, among others. The ABA Standards are divided into volumes according to topical area and have been amended over the years by the same process. A complete set of the Standards and a history of their development is available at http://www.Americanbar.org/groups/criminal_justice/policy/standards.html; *see also* Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 CRIM. JUST. 10, 14-15

The ABA Standards do not provide *per se* rules or a checklist for judicial evaluation of attorney performance, nor do they purport to establish the constitutional baseline for effective assistance of counsel. *See Rompilla* v. *Beard*, 545 U.S. 374, 399 (2005) (Kennedy, J., dissenting). They have, however, been recognized by this Court as "valuable measures of the prevailing professional norms of effective representation." *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1482 (2010). *See also Strickland* v. *Washington*, 466 U.S. 668, 688 (1984) ("Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what [performance of counsel] is reasonable").

The ABA Standards also embody the consistent recognition by ABA task forces of prosecutors, defenders and others in the criminal justice field that defendants must have effective assistance of counsel during the first proceeding in which a defendant may bring an ineffective assistance of trial counsel claim, regardless of whether that proceeding is direct appeal or state post-conviction review.

SUMMARY OF ARGUMENT

One of the most important constitutional challenges to the adequacy of criminal process is a claim that a defendant was denied the Sixth Amendment right to effective assistance of trial counsel. This is because the right to counsel is necessary to protect the fundamental right to a fair trial. Many states, including Arizona, designate post-conviction proceedings as the preferred or mandatory forum for litigating an

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(Winter 2009) (describing the process by which the Standards are developed and promulgated).

ineffective assistance of trial counsel claim ("trial-phase IAC claim") for the first time.

The ABA respectfully asserts that counsel representing a defendant at that proceeding should provide the same quality of representation—that is, effective assistance of counsel—as is constitutionally required of counsel at trial. First, unless counsel adequately investigates, builds a record for, and litigates a viable trial-phase IAC claim in that first proceeding, it is unlikely that the defendant will succeed on his trial-phase IAC claim. Second, effective assistance of counsel in the first state post-conviction proceeding is necessary in light of the potential for procedural and other errors that can preclude review of a defendant's Sixth Amendment claim. Third, an inadequately constructed record will likely affect the defendant's ability to obtain relief in a subsequent federal habeas proceeding because, under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and *Cullen* v. *Pinholster*, 131 S. Ct. 1388 (2011), defendants can no longer obtain federal habeas relief on the basis of facts outside of a defectively-constructed state record.

That is, a defendant may have a viable trial-phase IAC claim, but if counsel at that first proceeding is ineffective, he may be foreclosed from any opportunity for relief in either state or federal post-conviction proceedings. The ABA accordingly asserts that recognition of a right to effective assistance of counsel at the first proceeding in which a defendant may bring a trial-phase IAC claim is paramount if state and federal post-conviction proceedings are to remain viable forums for enforcing a defendant's Sixth Amendment right to trial counsel.

ARGUMENT

RECOGNITION OF A RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT A DEFENDANT'S FIRST OPPORTUNITY TO BRING AN INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIM IS PARAMOUNT FOR THE PROTECTION OF THE RIGHT TO A FAIR TRIAL.

This Court has stated that "the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." *Strickland*, 466 U.S. at 684. The Court has also stated that on direct appeal, there is no substitute for "the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on [the defendant's] behalf." *Douglas* v. *California*, 372 U.S. 353, 358 (1963). The ABA respectfully asserts that counsel is especially needed when, under the procedure adopted by a state, a post-conviction proceeding is the first opportunity for presenting a constitutional claim of ineffective assistance of trial counsel.

A. Effective Representation At The First Proceeding In Which A Trial-Phase IAC Claim May Be Presented Ensures Review Will Be Based On A Robust Record

To succeed on a trial-phase IAC claim, a defendant must show that trial counsel's performance was objectively unreasonable and that it prejudiced the defendant. *See Strickland*, 466 U.S. at 687-88. While "[n]avigating the appellate process without a lawyer's assistance is a perilous endeavor for a layperson," *Halbert* v. *Michigan*, 545 U.S. 605, 621 (2005), establishing trial-phase IAC claims on post-conviction review is more perilous still, because such claims

almost always require evidence that is outside of the trial record.

Indeed, many states require trial-phase IAC claims to be brought during state post-conviction review precisely because direct appeal is limited to claims which are evident on the face of the record. *See, e.g.*, *State* v. *Parrott*, 811 A.2d 705, 712 (Conn. 2003) ("Almost without exception, a claim of ineffective assistance of trial counsel must be raised by way of habeas corpus, rather than by direct appeal, because of the need for a full evidentiary record for such a claim.") (internal quotation marks omitted); *Archer* v. *State*, 986 So. 2d 951, 955 (Miss. 2008) (noting that while trial-phase IAC claims should ordinarily be brought on post-conviction review, they may be considered on direct appeal if facts of the claim are "fully apparent from the record."). Additionally, direct appeal counsel who also served as trial counsel will not often attack his or her own performance at trial. *See Halbert*, 545 U.S. at 620 n.5 ("A [trial] lawyer may not, however, perceive his own errors or the need for [postconviction motions for preservation of issues for appellate review].").

Preparing a robust record for review of a defendant's trial-phase IAC claims may require development of the necessary factual background through: (1) interviewing the client; (2) questioning prior defense counsel for the client and requesting access to the complete client files; (3) interviewing law enforcement officials involved in the case and requesting access to their files; and (4) speaking with prosecutors involved in the case and requesting

access to their files.[6] Investigating a trial-phase IAC claim may also require sophisticated legal assessments, such as determining whether trial counsel failed to move to suppress evidence obtained in violation of the Fourth Amendment.[7]

Effective litigation of a trial-phase IAC claim also requires the presentation of a written record in a form that comports with the rules of evidence and procedure applicable to that proceeding. At any oral hearing the court may conduct, effective assistance may also require compelling attendance of witnesses, admitting and presenting evidence, and cross-examining prosecution witnesses. Failure to comply with the forum's procedures and rules may foreclose the defendant's opportunity for relief in both state and federal post-conviction proceedings.

The ABA Standards recognize that a post-conviction proceeding is fundamentally an original judicial proceeding, involving problems of investigation and the development and presentation of a robust record. The ABA Standards accordingly provide that, "the responsibility of a lawyer in a post-conviction proceeding should be guided generally by the standards governing the conduct of lawyers in criminal cases." Standard 4-8.5 of the volume ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND

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[6] *See generally*, Randy Hertz and James S. Leibman, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 11.2[b] (6th ed. 2011).

[7] *See generally*, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 11.2[c] (outlining the various factual bases for an ineffective assistance of trial counsel claim). *See also*, *Kimmelman* v. *Morrison*, 477 U.S. 365, 383-87 (1986) (noting counsel's failure to request pretrial discovery that would have disclosed a potential Fourth Amendment violation).

DEFENSE FUNCTION (ABA 3d ed. 1993) (hereinafter "Defense Function Standards"). *See also* Commentary to Defense Function Standard 4-8.5 (the Standards applicable to lawyers performing these tasks "are essentially the same as those outlined in these Standards for the defense of a criminal case.").

The ABA Standards also provide that, when investigation reveals that trial counsel provided ineffective assistance, the first post-conviction counsel "should not hesitate to seek relief on that ground." Defense Function Standard 4-8.6(a).[8]

Without competent counsel, most indigent and incarcerated defendants who lack legal training will be unable to adequately perform these basic functions of assessment, investigation, and litigation that are necessary for presenting a trial-phase IAC claim. Rather, a defendant's attempt to enforce his Sixth Amendment right, especially "where the record is unclear or the errors are hidden," will often be a "meaningless ritual," *Douglas*, 372 U.S. at 358, without effective assistance of first state post-conviction counsel.

B. Effective Representation At The First Proceeding In Which A Trial-Phase IAC Claim May Be Brought Is Necessary In Light Of Procedural And Other Errors That Can Preclude Review

Effective representation during the first proceeding in which a trial-phase IAC claim may be brought is necessary if a defendant is to secure review in state

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[8] Similarly, counsel may decline to represent a defendant for his or her ineffective assistance of counsel claim only after investigation into prior defense counsel's conduct. Defense Function Standard 4-8.6(b).

and federal court forums because, to litigate a trial-phase IAC claim in state post-conviction proceedings, counsel must navigate a number of procedural rules specific to state post-conviction review.

These procedural rules include but are not limited to: statutes of limitations on post-conviction claims, tolling provisions for the pendency of some other event, rules about when a claim can or must be presented in a subsequent petition, appellate authorization procedures for certain kinds of claims, laws about when a collateral attack can be co-pending with certiorari proceedings in the United States Supreme Court, state comity and abstention rules that foreclose state courts from entertaining post-conviction challenges to convictions that are the subject of ongoing habeas proceedings, requirements for seeking discretionary review in the highest court of record in a state jurisdiction, and special types of leave necessary to appeal adverse trial decisions. Where counsel fails to comply, defendants will often be unable to obtain merits determinations on their trial-phase IAC claims.

Further, state post-conviction mistakes will often preclude federal post-conviction review. For example, trial-phase IAC claims rejected by state courts on procedural grounds are often "procedurally defaulted" on federal habeas review. *See, e.g.*, *Walker* v. *Martin*, 131 S. Ct. 1120, 1124-25 (2011) (holding that claim not timely asserted in petition for discretionary state post-conviction review was procedurally defaulted). In addition, state post-conviction counsel's failure to adequately litigate a trial-phase IAC claim, even if not dismissed on procedural grounds, can cause all of a defendant's federal post-conviction claims to be dismissed as unexhausted. *See Rose* v. *Lundy*, 455

U.S. 509, 510 (1982). Finally, improperly-filed state post-conviction petitions fail to toll the applicable federal habeas limitations period, *see* 28 U.S.C. § 2244(d)(2), which may render the federal claim untimely. *See Artuz* v. *Bennett*, 531 U.S. 4, 6-8 (2000) (finding that, because state post-conviction petition was properly filed, the federal limitations period was tolled for defendant's otherwise untimely federal habeas petition).

Effective assistance of counsel in the first proceeding in which a defendant may present a trial-phase IAC claim, accordingly, is necessary in light of the procedural and other errors that can preclude review of a defendant's Sixth Amendment claim.

C. Even If A Defendant Obtains Federal Merits Review, An Inadequately-Constructed State Record Limits The Factual Basis On Which A Federal Court May Grant Relief

AEDPA provides that federal habeas relief may issue only when a state decision on the merits is either legally or factually unreasonable. *See* 28 U.S.C. § 2254(d). Whether a state's decision is legally unreasonable is governed by 28 U.S.C. § 2254(d)(1), which allows relief where state adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Whether a state decision is factually unreasonable is determined in light of the state record; that requirement appears in AEDPA's plain text. *See* 28 U.S.C. § 2254(d)(2) (allowing habeas relief where the state proceedings "resulted in a decision that was based on an unreasonable determination of the facts *in light of the evidence presented in the State court proceeding*") (emphasis added).

Until recently, this Court had not decided whether the legal reasonableness of a state decision is also assessed exclusively against the evidence in the state record. In *Pinholster*, however, this Court decided that review under § 2254(d)(1) was restricted to the reasonableness of the state decision in light of the record before it. 131 S. Ct. 1388, 1398 ("The State argues that review is limited to the record that was before the state court that adjudicated the claim on the merits[, and we] agree with the State.").

Since *Pinholster*, accordingly, recognition of a right to effective assistance of counsel in the first proceeding in which a defendant may present a trial-phase IAC claim has become paramount if state and federal post-conviction proceedings are to remain viable forums for enforcing a defendant's Sixth Amendment right to trial counsel.

CONCLUSION

For the reasons stated above, *amicus curiae* American Bar Association requests that this Court reverse the decision below.

Respectfully submitted,

Of Counsel:
CLAUDIA WILSON FROST
LEE KOVARSKY
ELI BURRISS
DAWN JENKINS
HAROUT SAMRA

WILLIAM T. ROBINSON III
Counsel of Record
President
AMERICAN BAR ASSOCIATION
321 North Clark Street
Chicago, IL 60610
(312) 988-5000
abapresident@americanbar.org

Counsel for Amicus Curiae
American Bar Association

August 11, 2011

AMICUS CURIAE BRIEF

RECORDS AND BRIEFS

No. 10-1001

IN THE

Supreme Court of the United States

LUIS MARIANO MARTINEZ,

Petitioner,

vs.

CHARLES L. RYAN, Director,
Arizona Department of Corrections,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

KENT S. SCHEIDEGGER
Counsel of Record
CHRISTINE M. DOWLING
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
(916) 446-0345
briefs@cjlf.org

Attorneys for Amicus Curiae
Criminal Justice Legal Foundation

Library of Congress
Law Library

QUESTION PRESENTED

Should this Court's precedent in *Pennsylvania* v. *Finley*—that there is no constitutional right to counsel in collateral review—be overruled to the extent it applies to claims that could not have been litigated on direct appeal?

TABLE OF CONTENTS

Question presented i

Table of authorities iv

Interest of *amicus curiae* 1

Summary of facts and case 2

Summary of argument 4

Argument 5

I

Constitution creep is a poor way to allocate limited resources 5

A. A world of limited resources 5

B. Constitution creep 7

C. Rights and resources 12

II

Stare decisis warrants adherence to *Carrier*, *Finley*, and *Giarratano* 13

Conclusion 22

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Coleman v. Thompson, 501 U. S. 722, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991) 13, 14

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IN THE

Supreme Court of the United States

LUIS MARIANO MARTINEZ,

Petitioner,

vs.

CHARLES L. RYAN, Director,
Arizona Department of Corrections,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

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1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

In this case, the petitioner seeks to overturn precedents going back a quarter century to create a new constitutional right that this Court has unequivocally held does not exist—a right to counsel on collateral review of a criminal judgment. He further seeks to litigate on federal habeas corpus whether his state collateral review attorney was effective. This is an attempt to make an end-run around the reforms that Congress adopted to curtail abuse of the writ of habeas corpus. It would impair the finality of criminal convictions, contrary to the rights CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The facts of the case and its history in the state courts were described in the report of the Federal Magistrate Judge, App. to Pet. for Cert. 38a-42a, and accepted without objection by the District Court. See App. to Pet. for Cert. 27a. The victim in this case, petitioner's 11-year-old stepdaughter, described two acts of sexual abuse in a video-recorded forensic interview with a social worker. App. to Pet. for Cert. 38a. She later recanted her allegations, and at trial answered largely with "I don't know" or "I don't remember." The earlier recorded statement was played for the jury. As noted in petitioner's subsequent petition for review, the prosecution also introduced evidence of semen matching petitioner's DNA on the victim's nightgown. See App. to Brief in Opposition A-24. An expert on Child Sexual Abuse Accommodation Syndrome explained that false recantation by victims who are unsupported by their families is common. See *id.*, at A-14.

Petitioner took an appeal, which was stayed pending a petition for postconviction relief. See App. to Pet. for

Cert. 39a-40a. He was represented by the same attorney in both reviews. See *id.*, at 40a. The attorney could find no meritorious arguments for postconviction relief, and petitioner did not file a *pro se* pleading arguing any, as state procedure permits him to do. See *id.*, at 40a-41a.

After conclusion of direct appeal, petitioner filed a second state postconviction proceeding, claiming that trial counsel was ineffective and that first postconviction counsel was ineffective for not raising that claim. See *id.*, at 41a; see also App. to Brief in Opposition A-16 to A-27 (describing claims). This petition was considered by the original trial judge. The state trial court found, "Counsel's arguments do not raise a colorable claim of ineffective assistance of trial counsel, and, in any event, that claim is precluded . . . ." See *id.*, at B-27. Further review of this decision was denied by the state courts. App. to Pet. for Cert. 42a.

On federal habeas, the Magistrate Judge found that the ineffective assistance claim was procedurally barred, see *id.*, at 59a, and that there had been no miscarriage of justice. "Petitioner has not presented supplementary post-trial reliable evidence establishing he is factually innocent." *Id.*, at 62a. The Magistrate Judge also found in the alternative that the claim failed on the merits. See *id.*, at 63a.[2] The District Court concluded that the claim was defaulted and declined to reach the merits. See *id.*, at 33a-36a.

The Court of Appeals affirmed. It rejected the premise that there is a right to counsel in collateral proceedings under the circumstances of this case, *id.*, at 22a, and affirmed the procedural default holding of the

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2. This case appears to be an inappropriate vehicle for considering the question presented, given that the underlying claim has been considered and rejected on the merits twice.

District Court. See *id.*, at 23a-25a. Petitioner petitioned for rehearing en banc, and no judge called for a vote. See *id.*, at 85a. This Court granted certiorari on June 6, 2011.

SUMMARY OF ARGUMENT

The threshold question of whether to provide counsel on state collateral review is one of allocation of resources. Petitioner asks this Court to transform into a constitutional question a decision that has, up to now, been clearly within the legislative authority. This is an example of "constitution creep," expanding the scope of constitutional law to remove more and more decisions from the democratic process. Constitution creep has many ill effects, including stifling of innovation, expansion of the already-bloated scope of federal habeas review, and diminution of the people's right of democratic self-government.

Pennsylvania v. *Finley* and *Murray* v. *Giarratano* are on-point precedents contrary to the central thesis of petitioner's argument. For petitioner to prevail, they would have to be overruled as to claims that cannot be made on direct appeal. No case has been made under the doctrine of *stare decisis* for overruling these precedents. They have not been undermined by later decisions. They are not unworkable. Evading the limitations on habeas created by Congress is not a valid basis for overruling precedents Congress relied on when it enacted those limitations. State legislatures have also relied on the established law that the provision of counsel on collateral review is within their control. The implicit call to overrule *Finley* and *Giarratano* should be rejected.

ARGUMENT

I. Constitution creep is a poor way to allocate limited resources.

Oddly, the question of whether a State is constitutionally required to appoint counsel for indigent prisoners making their first collateral challenge comes to this Court from a State that does make such appointments as a matter of state law. This oddity results from the holding of *Evitts* v. *Lucey*, 469 U. S. 387, 396 (1985), that the right to effective assistance extends to an appeal where indigents have a constitutional right to appointed counsel. The State challenges the application of *Evitts* in Part II of its brief.

Assuming *Evitts* applies, the threshold question is whether States must appoint counsel for indigent prisoners on their first collateral review, at least in cases where the prisoner raises a claim that could not have been made on appeal. Because claims that could have been raised on appeal are barred from collateral review in most jurisdictions, that means most cases.

A. A World of Limited Resources.

In a world of unlimited resources, there would be little objection to providing every criminal defendant with a lawyer for his first postconviction review. But of course the world is not ideal. Indeed, an ideal world would have no crime and would not need a criminal justice system. "If men were angels, no government would be necessary." The Federalist No. 51 (J. Madison), reprinted in 1 The Founders' Constitution 330 (P. Kurland & R. Lerner eds. 1987). Constitutions must be written for the real world, with practical realities in mind. See *ibid.*

The problem is one of resource allocation. Providing counsel for collateral review, at least in some cases, is a

worthy goal. Congress has provided for collateral representation in all capital cases, whether the case originated in state or federal court. See 18 U. S. C. § 3599(a)(2). For capital cases in state court, most states have established a mechanism for appointment of counsel, see, *e.g.*, Cal. Govt. Code § 68662, and Congress has provided an incentive for the remaining states to do so. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Maples* v. *Thomas*, No. 10-63, pp. 17-23, available at http://www.cjlf.org/briefs/MaplesC.pdf

For noncapital cases, legislative authorities have determined, in many jurisdictions, that counsel should be provided in some but not all collateral review cases. For example, "*Whenever* the United States magistrate judge or the court determines that *the interest of justice so require*, representation *may* be provided for any financially eligible person who . . . (B) is seeking relief under section 2241, 2254, or 2255 of title 28." 18 U. S. C. § 3006A(a)(2) (emphasis added). This discretionary appointment provision contrasts sharply with the mandatory appointment requirement for most criminal prosecutions in paragraph (a)(1). Clearly Congress does not think that appointment in every case is an appropriate allocation of resources.

In a world of limited resources, every request for the government to spend money for a worthy goal is in competition with every other such request, all considered worthy by their proponents. A decision to spend a dollar on one worthy goal is a decision not to spend that dollar on some other worthy goal.

If this Court finds that a particular expenditure is constitutionally required, that expenditure butts in line, bypassing the legislative priority-assigning process. If the expenditure is required by the unambiguous words of the Constitution as understood at the time of adop-

tion, then this line-butting remains the people's choice, exercised in the constitution-making process rather than the standard legislative process. For example, jury trial must be provided in those federal cases where the Sixth and Seventh Amendments require it, regardless of cost, because the people so decided when they ratified those amendments, and that was understood at the time.

Petitioner in the present case seeks to allocate resources through a very different mechanism. He and supporting *amici* advance reasons why collateral counsel in every case is a worthy goal. Then they ask this Court to move this expenditure to the front of the line, not by any decision of the people of the United States to give it that preferred status, but rather through a process we call constitution creep.

B. Constitution Creep.

In recent years, the term "mission creep" has entered the lexicon, first in military and foreign affairs, and then spreading to other fields. See, *e.g.*, Etzioni, Mission Creep and Its Discontents, Middle East Quarterly 3-15 (Spring 2011) (U. S. operations in Afghanistan). Definitions of this term vary, but one definition is "doing a much larger job for a longer time than was originally expected, especially in a military operation." Cambridge Dictionaries Online, http://dictionary.cambridge.org/dictionary/british/mission-creep (viewed Sept. 7, 2011).

A similar broadening far beyond the original mission has occurred in constitutional law. The broadening might be called "constitution creep." The term is new, but warning against it is not. Some of the nation's foremost legal minds have raised warnings over the course of many years. Justice Jackson warned long ago, "This Court is forever adding new stories to the temples

of constitutional law, and the temples have a way of collapsing when one story too many is added. So it was with liberty of contract, which was discredited by being overdone." *Douglas* v. *Jeannette*, 319 U. S. 157, 181 (1943) (concurring in the result). Judge Friendly warned that the Bill of Rights was being expanded into a "detailed Code of Criminal Procedure, to which a new chapter is added every year." Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 156 (1970) (footnoted omitted).

Constitution creep has many ill effects, particularly when it occurs at the federal level. First, constitutionalizing a rule of law makes the rule particularly difficult to change, even when new knowledge and experience call for a change. A federal constitutional decision by this Court can be changed only by an overruling of this Court or by the drastic and difficult process of amending the Constitution. In the case of *Perry* v. *New Hampshire*, No. 10-8974, petitioner asks the Court to constitutionalize evidence rules on the reliability of eyewitness identifications. As CJLF will explain in our brief in that case (to be filed shortly after this brief), the science on reliability continues to evolve, a situation for which constitutional rule-making is ill-suited. As another example, the sweeping dictum of *Lockett* v. *Ohio*, 438 U. S. 586, 605 (1978) (plurality opinion), was ill-considered from the beginning and has subsequently had massive unintended consequences in terms of delay and expense in capital cases. See generally Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Schriro* v. *Styers*, No. 08-1350, available at http://www.cjlf.org/briefs/Styers.pdf. Yet the states have all been forced to conform their statutes to *Lockett*'s mandate, making it difficult to get the issue back before this Court.

A second, related problem is that federalizing a rule stifles innovation in the states, innovations that could lead to better practices. Constitutionalizing a legal issue "short-circuit[s] . . . legislative response." *District Attorney's Office for the Third Judicial Dist.* v. *Osborne*, 557 U. S. __, 129 S. Ct. 2308, 2322, 174 L. Ed. 2d 38, 54 (2009). For example, even though *Miranda* v. *Arizona*, 384 U. S. 436, 490 (1966), said that the measures laid out in the opinion were not rigid and states could try other methods of protecting the privilege against self-incrimination, a state would be foolish to try. In *Florida* v. *Powell*, 559 U. S. __, 130 S. Ct. 1195, 1200-1201, 175 L. Ed. 2d 1009, 1015 (2010), a state supreme court had thrown out a confession for a minor variation in the wording of the warning. While this Court reversed, two Justices would have affirmed, and the upholding of this particular variation gives no assurance other variations will be upheld. For a state's standard warning, and all confessions obtained with it, to be thrown out after years of use would be a disaster that a state ought not risk. Britain, where the advisement is prescribed by statute rather than constitution creep, has a better form. See Altdoerffer, *Miranda* with an English Accent, 10 Engage 35 (Oct. 2009), http://www.fed-soc.org/doclib/20091116_AltdoerfferEngage10.3.pdf.

Similarly, over four decades ago, Chief Justice Burger threw down the gauntlet and challenged legislatures to devise a better way to enforce the Fourth Amendment. *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 422 (1971) (dissenting opinion). No legislature picked it up, and none is likely to. So long as the exclusionary rule remains a constitutional mandate, no legislature can enact an alternative remedy with any assurance that it really will be accepted as a substitute. So we are stuck with a remedy that "exacts a heavy toll on both the judicial system and

society at large." *Davis* v. *United States*, 564 U. S. __, 131 S. Ct. 2419, 2427, 180 L. Ed. 2d 285, 294 (2011).

Third, constitutionalizing a rule that previously had been one of state law opens the judgments of state courts on that issue to scrutiny on federal habeas corpus, with all the difficult problems of federalism, finality, and resource expenditure that such scrutiny entails. Congress took dramatic action in 1996 to curtail this review in the Antiterrorism and Effective Death Penalty Act of 1996, and cases involving that statute have been a large slice of this Court's workload ever since. Yet federal habeas for state prisoners remains a long and costly endeavor. Indeed, two well-known habeas scholars have concluded that federal habeas review of state criminal judgments has become such a "costly charade" that it should be abolished almost entirely, at least in noncapital cases. See N. King & J. Hoffman, Habeas for the Twenty-First Century: Uses, Abuses, and Future of the Great Writ 87 (2011). Expansion of the scope of constitutional criminal procedure expands the scope of a costly and largely fruitless procedure that we should be contracting.

The fourth ill effect of constitution creep is the least tangible, yet ultimately it may be the most detrimental. Every new constitutional rule benefitting criminal defendants is promptly hailed in the law reviews as an advance for constitutional rights. Yet every new chapter in the "detailed code" is also a loss to constitutional right number one—the right of the people to govern themselves through the democratic process. Does the Constitution provide that all important decisions are constitutional questions to be decided by judges, with the democratic process reduced to deciding trivia? See *Compassion in Dying* v. *Washington*, 79 F. 3d 790, 858 (CA9 1996) (en banc) (Kleinfeld, J., dissenting), rev'd *sub nom. Washington* v. *Glucksberg*,

521 U. S. 702 (1997). That seems to be the unstated premise of the American Bar Association's *amicus* brief—it is important; therefore it is constitutional. But this conclusion does not follow.

A few fundamental rights were placed in the Constitution where the legislative authority cannot change them by ordinary statute. The ones placed there are those that were both fundamental enough to warrant such protection and agreed upon by an overwhelming consensus of the people. Other rights may be equally important. They may even be within the "penumbra" of a right in the Constitution. Cf. *NASA* v. *Nelson*, 562 U. S. __, 131 S. Ct. 746, 766, 178 L. Ed. 2d 667, 689 (2011) (Scalia, J., concurring in the judgment). But a right is not legitimately in the Constitution unless the people decided to put it there. If they did not, then its existence and scope are within the control of the people through the normal democratic process.

For a court to usurp to itself a decision that the Constitution actually leaves to the legislative authority is a violation of the constitutional separation of powers and a violation of the people's right to democratic self-government. Usurpation in the name of enforcing the Constitution is actually a gross violation of the Constitution.

The notion that all important questions must be constitutional questions has a corrosive effect on the process for selecting judges for the federal courts generally and this Court in particular. If an Act of Congress is little more than a staff recommendation to the real decision-maker, the judiciary, then the political battles over the selection of the judiciary become more important than the battles over the legislation itself. In such an environment, the vitriolic confirmation battles we have seen are not at all surprising and cannot be expected to abate in the future. See O'Scannlain,

Lawmaking and Interpretation: The Role of a Federal Judge in Our Constitutional Framework, 91 Marquette L. Rev. 895, 915 (2008).

Constitution creep needs to be recognized for the insidious temptation that it is. Each step might seem, examined *in vitro*, to be a positive one. Yet collectively and *in vivo* the expansion of the Constitution into a "detailed code" has detrimental effects on federalism, on innovation, on democracy, and ultimately on the judiciary itself.

C. Rights and Resources.

"All rights tend to declare themselves absolute to their logical extreme," Justice Holmes wrote for the Court in *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 355 (1908). "Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached." The other policy, on the question of providing counsel for collateral review,[3] is the always-important policy of limiting expenditure of public funds. Government cannot spend without limit, and expenditure must be directed where it will do the most good, generally known as "getting the most bang for the buck."

Is a mandate to provide state-paid counsel for every indigent collateral review petitioner a more effective way to achieve justice than the other measures those dollars might be spent on? Who should decide that question?

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3. On the question of litigating effectiveness of collateral counsel in subsequent reviews, there are policy considerations of finality and federalism in addition to resources.

An *amicus* describes a few cases where ineffective assistance led to conviction of innocent people. See Brief of Innocence Network as *Amicus Curiae* 7-11. Certainly conviction of the innocent is the ultimate injustice, and measures to reduce the possibility of that happening and correcting it when it does happen deserve a very high priority within judicial budgets. But is spending money on collateral review a better way to address that problem than spending money on better defense representation at trial? See King & Hoffman, *supra*, 100-101. Meritorious habeas petitions have long been compared to needles in the haystack. See *Brown* v. *Allen*, 344 U. S. 443, 537 (1953) (Jackson, J., concurring in the result). The Innocence Network has shown the Court a few needles in a pitch to sell the haystack. Better measures to keep needles out of haystacks in the first place might be wiser than a massive, permanent, carved-in-concrete mandate to search haystacks.

These are questions without simple answers. *Amicus* CJLF does not pretend to have definitive answers. We do maintain that further spread of constitutional mandates is a poor way to answer them.

II. *Stare decisis* warrants adherence to *Carrier*, *Finley*, and *Giarratano*.

This Court recognized in *Coleman* v. *Thompson*, 501 U. S. 722, 752-753, 755 (1991), that the argument petitioner made in that case was precluded by the precedents in *Murray* v. *Carrier*, 477 U. S. 478, 488 (1986), *Pennsylvania* v. *Finley*, 481 U. S. 551, 556 (1987), and *Murray* v. *Giarratano*, 492 U. S. 1 (1989). "For Coleman to prevail, therefore, there must be an *exception* to the rule of *Finley* and *Giarratano* in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction."

Coleman, *supra*, at 755 (emphasis added). To create an exception to a precedent that contains no such exception is to overrule the precedent in part. The *Coleman* Court decided that it need not address whether to overrule *Finley* and *Giarratano* in part, because the alleged ineffectiveness of Coleman's counsel in state habeas was on appeal and not in the first court to consider the claim. See *ibid*. As a result, *Coleman* is distinguishable from the present case, but *Finley* and *Giarratano* are not. The precedential force of those decisions is not diminished by the fact that a later case pondered whether to make an exception to them but then decided that a more limited question was actually presented by the case before it.

Petitioner in the present case effectively asks for the same partial overruling that Coleman asked for, but the question cannot be avoided on the same basis that it was avoided in *Coleman*. Petitioner does not expressly say that he is asking the Court to overrule *Finley* and *Giarratano*, but he cannot prevail otherwise.

Carrier established that a default by an attorney is not "cause" for default under the procedural default rule unless that default amounted to constitutionally ineffective assistance of counsel. See 477 U. S., at 488. Hence, attorney error cannot be "cause" where there is no constitutional right to counsel. If there were any doubt that the *Carrier* rule really is that broad, it was eliminated in *Coleman*. See 501 U. S., at 752-753. Petitioner does not challenge this holding. See Brief for Petitioner 22.

Finley clearly and unequivocally held that there is no constitutional right to counsel on state collateral review. "States have no obligation to provide this avenue of relief [citation], and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer

as well." 481 U. S., at 557. This holding was not based on the nature of the claims presented in collateral review, but rather on the nature of the proceeding as being even further removed from trial than a discretionary appeal. See *id.*, at 556-557.

Finley was part of a series of cases creating a greater distinction between direct and collateral review. Just four months earlier, *Griffith* v. *Kentucky*, 479 U. S. 314, 321-322 (1987), had drawn a line between direct and collateral review for the purpose of retroactivity of new rules of procedure. That distinction was intensified not long after in *Teague* v. *Lane*, 489 U. S. 288, 310 (1989) (plurality opinion). Other cases distinguished direct from collateral review with regard to the exclusionary rule, see *Stone* v. *Powell*, 428 U. S. 465, 494-495 (1976), and harmless error analysis. See *Brecht* v. *Abrahamson*, 507 U. S. 619, 637-638 (1993).

The application of *Finley* to capital cases arose in a case from Virginia, *Murray* v. *Giarratano*, *supra*. There could be no doubt that *Giarratano* was primarily, if not exclusively, about representation for claims that could not have been made on appeal. The Court was familiar with the long-established Virginia rule that a claim that could have been made on appeal cannot be raised in state habeas. See *Smith* v. *Murray*, 477 U. S. 527, 533 (1986). The *Giarratano* plurality held squarely that *Finley* applies unmodified to capital cases. See 492 U. S., at 10. The concurrence is less clear but rejected the proposition that appointment of counsel in every case is required, see *id.*, at 14-15 (opinion of Kennedy, J.), and that is more than sufficient to negate petitioner's argument in the present case.[4]

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4. Because both opinions concurring in the judgment are contrary to petitioner's thesis, there is no need to struggle with the Gordian knot of the rule of *Marks* v. *United States*, 430 U. S.

No case since *Finley* and *Giarratano* has overruled them in whole or in part. Petitioner claims that *Coleman* "recognized that there might be an exception . . . when 'state collateral review is the first place a prisoner can present a challenge to his conviction.'" Brief for Petitioner 16. That is a considerable overstatement. As is clear from the full sentence, quoted *supra*, at 13, the *Coleman* Court only noted that the petitioner would need for this exception to be created in order to prevail, and the Court went on to decide that only a narrower issue was actually presented.

Petitioner relies heavily on *Halbert* v. *Michigan*, 545 U. S. 605 (2005), but he does not contend that *Halbert* overruled *Finley* and *Giarratano*. Any such argument would be meritless, as the opinion of the Court in *Halbert* does not even mention either of those cases.[5] "This Court does not normally overturn, or so dramatically limit, earlier authority *sub silento*." *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U. S. 1, 18 (2000). While *Halbert* provides some language that is useful for makeweight arguments for petitioner, the question before the Court in that case did not require reconsideration of *Finley*, and hence it cannot be one of the rare instances where the Court does overrule a precedent by implication.

"The question at hand . . . [in *Halbert* was] whether this case should be bracketed with *Douglas* v. *California*, 372 U. S. 353 (1963), because appointed counsel is sought for initial review before an intermediate appellate court, or with *Ross* v. *Moffitt*, 417 U. S. 600 (1974),

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188 (1977), a rule "more easily stated than applied." *Nichols* v. *United States*, 511 U. S. 738, 745 (1994).

5. The dissent mentions them in passing. See *id.*, at 628, and n. 1 (opinion of Thomas, J.).

because a plea-convicted defendant must file an application for leave to appeal." 545 U. S., at 616, n. 2. Under those precedents, appointment was required for a first-tier appeal as of right but not for a discretionary second-tier appeal. *Halbert* decided that the first-tier v. second-tier characteristic was more important than the discretionary v. of-right characteristic for the purpose of drawing the line between the set of cases grouped with *Douglas* and the set grouped with *Ross*.[6] See *id.*, at 619. This decision is based unambiguously on the importance of the "first, and likely the only, direct review the defendant's *conviction and sentence* will receive." *Ibid.* (emphasis added). The precedents in *Finley* and *Giarratano*, where the convictions and sentences had received a previous review, were therefore not at issue.

Finley and *Giarratano* are therefore Supreme Court precedents squarely contrary to an essential element of petitioner's argument, unimpaired by any subsequent precedents. The Court of Appeals correctly recognized them as such. See App. to Pet. for Cert. 9a. Indeed, the Court of Appeals cited and quoted *Finley* repeatedly. See *id.*, at 17a, 21a, 22a. What argument does petitioner make, under the doctrine of *stare decisis*, for overruling a controlling Supreme Court precedent correctly relied on by the decision he seeks to have reversed? Remarkably, he does not mention *Finley* once in his brief, much less make any argument for overruling it. Equally remarkable is the complete absence of any discussion of *Finley* or argument for overruling it in any of three *amicus* briefs filed in

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6. For an explanation of sets of cases defined by material facts in the application of precedent, with emphasis on the *Marks* rule, see Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Grutter* v. *Bollinger*, No. 02-241, pp. 5-13.

support of the petitioner. See Brief of American Bar Association as *Amicus Curiae*; Brief of Former State Supreme Court Justices as *Amici Curiae*; Brief of Innocence Network as *Amicus Curiae*.

"While *stare decisis* is not an inexorable command, particularly when we are interpreting the Constitution, even in constitutional cases the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some special justification." *Dickerson* v. *United States*, 530 U. S. 428, 443 (2000) (citations and internal quotation marks omitted). Subsequent cases have not undermined the doctrinal underpinnings of *Finley*. Cf. *ibid*. *Halbert*'s approach of looking at the tier of review of the judgment, not of individual claims, is consistent with the rationale of *Finley* that collateral review is "even further removed from the criminal trial" than the second tier of direct review. *Finley*, 481 U. S., at 556-557.

One reason for abandoning a precedent is that it "has proved unworkable." See *Hudson* v. *United States*, 522 U. S. 93, 102 (1997). No such argument can be made for overruling *Finley*. The simple bright line drawn by that case, in conjunction with *Ross* and *Halbert*, is eminently workable. The constitutional right to counsel exists at trial and on the first-tier appeal, period. Abandoning the well-established tier approach for a claim-by-claim approach is the path that leads to unworkability. What if the record on appeal (the trial transcript and perhaps the record of a new trial motion) provides some basis for raising an ineffective assistance claim, but a better, more compelling argument for that claim can be made with additional evidence on state collateral review? Would we then say that even though the state collateral review was not the first opportunity to review the claim, it was the first as

a practical matter? Would we say that the additional evidence had transformed the claim so as to make it a new claim? Cf. Transcript of Oral Argument in *Bell* v. *Kelly*, No. 07-1223, p. 13 (2008). Petitioner in this case may seek only a rule applicable to states where ineffective assistance claims are categorically excluded from direct appeal. If such a rule is created, though, the argument will immediately be made that this is a distinction without a difference in the typical case, where the claim cannot be made on appeal as a practical matter.

Although not directed specifically to *Finley*, the argument of *amici* Former State Supreme Court Justices, at pages 15-22, could be read as a claim that the changed circumstance of reduced availability of federal habeas warrants reexamination of the *Finley* precedent. But the availability of a federal backstop never was the basis of *Finley*. Not a word in the opinion even hints at such a rationale. *Finley* has always been understood to negate a constitutional right to counsel for federal prisoners seeking relief under 28 U. S. C. § 2255, where there is no backstop. See, *e.g.*, *United States* v. *Angelone*, 894 F. 2d 1129, 1130 (CA9 1990).

On a related theme, the claim is made that Congress's retraction of federal habeas for state prisoners is a ground to expand federal habeas for state prisoners by allowing litigation of the competence of state habeas counsel. See Brief for Petitioner 20-21. This argument has ominous implications for the separation of powers. The scope of federal habeas for state prisoners is entirely within the power of Congress to prescribe. Congress could, and once did, forbid such use of the writ altogether. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 932 (1998). When Congress directs

that the scope of federal habeas has become excessive and needs to be contracted, courts should not evade that direction by expanding the scope somewhere else, contrary to the body of precedent on which Congress relied when it enacted the limitation. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Maples* v. *Thomas*, No. 10-63, pp. 5-17.

An argument might be made that the number of innocent people wrongly convicted is greater than previously realized, and that this is a changed circumstance warranting reconsideration of *Finley*. As discussed in Part I, *supra*, it is far from clear that devoting increased resources to collateral review instead of trial is the optimum solution to this problem. Speculation is a poor basis for overruling a considered constitutional precedent.

An important reason not to overrule a precedent is reliance, and in this case the reliance by legislatures throughout the Nation looms large. As previously discussed in our *Maples* Brief, *supra*, at 13, Congress relied on *Finley* and *Giarratano* in deciding which aspects of the law of habeas corpus it needed to change in AEDPA and which it could leave as they were. At the state level, states have adopted collateral review mechanisms and decided whether to appoint counsel for all indigent prisoners on their first review or to follow the lead of Congress and be more selective. In California, for example, collateral counsel is appointed in all capital cases, see Cal. Govt. Code §68662, but in noncapital cases counsel must be appointed only if the application survives the initial screening and the court

issues an order to show cause. See *In re Clark*, 5 Cal. 4th 750, 780, 855 P. 2d 729, 748 (1993).[7]

State governments have made these decisions with the understanding that (1) they can create collateral review mechanisms while still retaining control over which cases warrant appointment of counsel, and (2) if they do appoint counsel, the effectiveness of that counsel will not be subject to litigation in federal habeas corpus. Cf. *Finley*, 481 U. S., at 559 ("a valid choice to give prisoners the assistance of counsel without requiring the full panoply of procedural protections . . ."); 28 U. S. C. §2254(i). The cost factor in a mandate to appoint counsel in every case is obvious. Litigating the effectiveness of that attorney in federal habeas also involves a large cost in dollars and finality. Given the standard for an ineffective assistance claim, litigating that claim in federal habeas often amounts to *de facto* litigation of the underlying claim. See, *e.g.*, *Lockhart* v. *Fretwell*, 506 U. S. 364, 369-370 (1993) (no habeas relief for counsel's failure to make meritless claim); *Harrington* v. *Richter*, 562 U. S. __, 131 S. Ct. 770, 778, 178 L. Ed. 2d 624, 642 (2011) (ineffective assistance claim as escape from default rules). The reliance factor therefore weighs heavily against overruling.

Finley is on-point precedent, and the case has not been made that it can be overruled consistently with the doctrine of *stare decisis*. "That doctrine permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in

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7. The contrary statement in 1 D. Wilkes, State Postconviction Remedies and Relief § 7:38, p. 214 (2009-2010 ed.) is an error.

fact." *Vasquez* v. *Hillery*, 474 U. S. 254, 265-266 (1986). The implicit call to overrule *Finley* should be rejected.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be affirmed.

September, 2011

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

AMICUS CURIAE BRIEF

No. 10-1001

In The Supreme Court of the United States

LUIS MARIANO MARTINEZ,

Petitioner,

vs.

CHARLES L. RYAN, Director
Arizona Department of Corrections,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF FORMER STATE SUPREME COURT JUSTICES AS AMICI CURIAE IN SUPPORT OF PETITIONER

GEORGE H. KENDALL
Counsel of Record
SAMUEL SPITAL
CORRINE IRISH
CARINE WILLIAMS
SQUIRE SANDERS & DEMPSEY (US) LLP
30 Rockefeller Plaza
New York, NY 10112
212.872.9800
george.kendall@ssd.com

PIERRE H. BERGERON
SQUIRE SANDERS & DEMPSEY (US) LLP
221 E. Fourth Street, Suite 2900
Cincinnati, OH 45202
513.361.1200

ALISON E. KLINGEL
SQUIRE SANDERS & DEMPSEY (US) LLP
1 E. Washington Street, Suite 2700
Phoenix, AZ 85004
602.528.4000

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
INTEREST OF AMICI	1
AMICI	3
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. In Our System Of Federalism, Both State Courts And Federal Courts Are Charged To Protect And Enforce Constitutional Rights	7
II. The Federal Habeas Courts Assumed The Lead In Enforcing Federal Rights During The 1960's-1970's Due To The Lack Of Viable State Postconviction Remedies	10
III. The Court And Congress Define A Narrower Secondary Role For The Federal Habeas Courts	15
IV. Current State Postconviction Remedies Fail To Guarantee A Full Opportunity To Develop Federal Claims That Cannot Be Asserted At Trial Or On Direct Appeal	22
V. Indigent Petitioners In State Postconviction Proceedings Require Effective Counsel To Adequately Litigate At First Tier Review Those Federal Claims That Cannot Be Asserted Earlier	27
CONCLUSION	28

TABLE OF AUTHORITIES

Page

CASES

Ashcraft v. Tennessee, 322 U.S. 143 (1944).....10

Betts v. Brady, 316 U.S. 455 (1942).....10

Brecht v. Abrahamson, 507 U.S. 619 (1993).....18

Bynum v. State, 932 So. 2d 361 (Fla. App. 2006).....25

Case v. Nebraska, 381 U.S. 336 (1965).....12, 13, 22

Chambers v. Florida, 309 U.S. 227 (1940).....10

Chapman v. California, 386 U.S. 18 (1967).....18

Claflin v. Houseman, 93 U.S. 130 (1876).....8

Coleman v. Thompson, 501 U.S. 722 (1991).....16

Cullen v. Pinholster, 563 U.S. ___, 131 S. Ct. 1388 (2011).....21, 27

Dobbs v. Turpin, 142 F.3d 1383 (11th Cir. 1998).....14

Douglas v. California, 372 U.S. 353 (1963).....7, 27

Ex Parte Hawk, 321 U.S. 114 (1944).....9

Ex Parte Royall, 117 U.S. 241 (1886).....9

Fay v. Noia, 372 U.S. 391 (1963).....13, 14, 16

Francis v. Henderson, 425 U.S. 536 (1976).....16

Guerra v. Johnson, 90 F.3d 1075 (5th Cir. 1996).....14

Halbert v. Michigan, 545 U.S. 605 (2005).....7, 27

Harrington v. Richter, 562 U.S. ___, 131 S. Ct. 770 (2011).....21, 22

Harris v. Reed, 894 F.2d 871 (7th Cir. 1990).....15

TABLE OF AUTHORITIES – Continued

Page

Henderson v. Sargent, 926 F.2d 706 (8th Cir. 1991) 14

Holland v. Jackson, 542 U.S. 649 (2004) 19

Jefferson v. Upton, 560 U.S. ___, 130 S. Ct. 2217 (2010) 21

Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992) ... 17, 18, 19, 20

Kotteakos v. United States, 328 U.S. 750 (1946) 19

Lamarca v. State, 931 So. 2d 838 (Fla. 2006) 23

Lindsey v. King, 769 F.2d 1034 (5th Cir. 1985) 15

Loden v. State, 43 So. 3d 365 (Miss. 2010) 23

Martinez v. Schriro, 623 F.3d 731 (9th Cir. 2010) 5

McCleskey v. Zant, 499 U.S. 467 (1991) 16

Miller v. Pate, 386 U.S. 1 (1967) 14

Mills v. State, 868 N.E.2d 446 (Ind. 2007) 23

Mooney v. Holohan, 294 U.S. 103 (1935) 8

Moore v. Dempsey, 261 U.S. 86 (1923) 17

Murray v. Carrier, 477 U.S. 478 (1986) 16

People v. Petrenko, 931 N.E.2d 1198 (Ill. 2010) 23

Robb v. Connolly, 111 U.S. 624 (1884) 8

Rose v. Lundy, 455 U.S. 509 (1982) 9

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 8

Silva v. People, 156 P.3d 1164 (Colo. 2007) 25

TABLE OF AUTHORITIES – Continued

Page

Smith v. Murray, 477 U.S. 527 (1986) 9

Smith v. O'Grady, 312 U.S. 329 (1941) 10, 11

State v. Milne, 842 A.2d 140 (N.J. 2004) 24

State v. Spreitz, 39 P.3d 525 (Ariz. 2002) 4

Teague v. Lane, 489 U.S. 288 (1989) 18

Townsend v. Sain, 372 U.S. 293 (1963) 13, 14, 16, 17

Troedel v. Dugger, 828 F.2d 670 (11th Cir. 1987) 15

Wainwright v. Sykes, 433 U.S. 72 (1977) 9, 16

Walker v. Lockhart, 763 F.2d 942 (8th Cir. 1985) 15, 24

(Michael) Williams v. Taylor, 529 U.S. 420 (2000) 19

(Terry) Williams v. Taylor, 529 U.S. 362 (2000) 20

Woodford v. Visciotti, 537 U.S. 19 (2002) 21

Young v. Ragen, 337 U.S. 235 (1949) 11, 12

CONSTITUTION, STATUTES AND RULES

U.S. Const. amend. VI 5, 6, 12

U.S. Const. amend. XIV 2, 14

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ..... 19, 20, 21, 22

28 U.S.C. § 2254(d) 21, 22

28 U.S.C. § 2254(d)(1) 20, 21

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 2254(d)(2) 21
28 U.S.C. § 2254(d)(3) (1994) 21
28 U.S.C. § 2254(e)(1) 21
28 U.S.C. § 2254(e)(2) 19, 20
28 U.S.C. § 2254(e)(2)(A) 19
28 U.S.C. § 2254(e)(2)(B) 19
Ala. R. Crim. P. 32.6(b) 24
Illinois Post-Conviction Hearing Act of 1949 12
Judiciary Act of 1789 8
La. Code Crim. P. Art. 930.7 25
Ohio Rev. Code Ann. § 120.06(A)(3) 25
Okla. Stat. Ann., tit. 22 § 1083(a) 26
Pa. Cons. Stat. Ann., tit. 42 § 9545(d)(2) 26
Supreme Court Rule 37.3 1
Supreme Court Rule 37.6 1
Tenn. Code Ann. § 40-30-106(d) 24
Wash. R. App. P. 16.12 26

MISCELLANEOUS

Brief of *Amici Curiae* Alabama Appellate Court Justices and Bar Presidents in Support of Petitioner, *Maples v. Thomas*, No. 10-63 23

TABLE OF AUTHORITIES – Continued

Page

U.S. Department of Justice, Bureau of Justice Standards, *Habeas Corpus, Federal Review of State Prisoner Petitions* (March 1984) 14

Perrello & Delzeit, *Habeas Corpus in San Diego Superior Court (1991-1993): An Empirical Study*, 19 T. Jefferson L. Rev. 283 (1997).....25, 26

Donald E. Wilkes, Jr., *State Postconviction Remedies and Relief Handbook*, Volume 1 (West 2010).....*passim*

I

INTEREST OF AMICI

We are former state supreme court justices who submit this brief as amici curiae in support of Petitioner Martinez, pursuant to Supreme Court Rule 37.[1]

As members of the state judiciary, we devoted a substantial portion of our judicial attention to safeguarding the integrity and reliability of criminal prosecutions, ensuring that criminal proceedings in our respective states complied with both state and federal constitutional protections against improper and wrongful conviction. Federal claims can arise at any stage of a state criminal trial, as well as in many direct appeals. Certain federal claims, notably those asserting that the prosecution suppressed material evidence or that trial counsel was constitutionally ineffective, cannot practically be brought either at trial or on direct appeal because of the difficulties of discovering, or adequately litigating, the facts or legal principles supporting the claims. In some cases, as in the instant case, criminal defendants are prohibited from bringing these types of claims prior to state postconviction proceedings.

State and federal postconviction courts have long worked in tandem towards the goal of upholding

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[1] Pursuant to Rule 37.6, counsel for amici state that no counsel for a party authored this brief in whole or in part, and that no person other than amici or their counsel made any monetary contribution to the preparation or submission of this brief. The parties have filed blanket consent letters with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

federal constitutional rights. During the past half century, we have witnessed dramatic changes in the postconviction review of such claims in both the state and federal court systems. Prior to the 1960's, few federal claims were available to state defendants, and their review in state postconviction was rare. With this Court's incorporation of many federal Bill of Rights protections into the Fourteenth Amendment and expansion of access to federal habeas review in the 1960's, state petitioners who believed their federal rights were not upheld increasingly sought relief from the federal habeas courts. Underdeveloped state postconviction remedies often served only as a way-station to federal court.

During the past three decades, there has been a significant shift away from a federal habeas-dominated postconviction review process toward one that is state-court focused. This trend has been driven by decisions of this Court that modified and reduced the role of the federal courts, and further by congressional amendments to the federal habeas corpus statute in the Antiterrorism and Effective Death Penalty Act of 1996 that increased the significance and importance of state postconviction remedies.

Today, state postconviction remedies must provide a full opportunity for the development of federal constitutional claims that cannot be raised in earlier proceedings. Such claims typically are ones that require the assistance of counsel, investigative services, and extra-record development. State attorneys general have long recognized the necessity of providing skilled specialists at these proceedings. Prisoner-petitioners,

many of whom have limited education and mental limitations, also require the aid of skilled counsel and, when necessary, access to investigative and expert assistance, at least at the first stage in the state process where such claims are typically brought.

AMICI

Harry Lee Anstead served as an Associate Justice on the Florida Supreme Court from 1994 until 2009, and served as the Court's Chief Justice from 2002 through 2004.

Charles F. Baird served as an Associate Justice on the Texas Court of Criminal Appeals from 1990 through 1998.

Fred L. Banks, Jr., served as an Associate Justice on the Mississippi Supreme Court from 1991 through 2001, and was the Presiding Justice at the time of his retirement.

Rhoda Billings was appointed to the North Carolina Supreme Court as an Associate Justice in 1985 and served through 1986. In 1986, she was appointed Chief Justice.

Norman S. Fletcher served as an Associate Justice on the Supreme Court of Georgia from 1989 until 2001 when he was elevated to Chief Justice. He served in this position until his retirement in 2005.

Stewart F. Hancock, Jr, served as an Associate Justice on the New York Court of Appeals from 1986 through 1994.

Gerald Kogan served as an Associate Justice on the Florida Supreme Court from 1987 until 1996 when he became Chief Justice. He served in this position until his retirement in 1998.

Terry Trieweiler served as an Associate Justice on the Montana Supreme Court from 1991 through 2002.

Robert F. Utter served as an Associate Justice on the Washington Supreme Court from 1971 through 1995, except when he served as the Court's Chief Justice from 1979 through 1981.

Penny J. White served as an Associate Justice on the Tennessee Supreme Court from 1994 through 1996.

Michael D. Zimmerman served as an Associate Justice on the Supreme Court of Utah from 1984 until 2000, and served as Chief Justice from 1994 through 1998.

STATEMENT OF THE CASE

Martinez, an indigent prisoner in Arizona, sought to raise a federal constitutional claim – that his trial counsel failed to provide the effective assistance of counsel – in state postconviction proceedings. Under state law, this claim cannot be brought in earlier proceedings. *See State v. Spreitz*, 39 P.3d 525, 527 (Ariz. 2002). His appointed direct appeal attorney, apparently without notice to Martinez, initiated the state postconviction process. Without performing any

investigation as to trial counsel's effectiveness, she told the court she could find no colorable issue to raise, and the petition was later dismissed. When Martinez, through new counsel, filed a subsequent petition alleging his trial counsel had failed to provide effective assistance as required by the Sixth Amendment to the Constitution, the state courts ruled that the claim was precluded because the claim had not been asserted in his original state habeas proceeding, and it did not matter whether first state postconviction counsel had performed competently. *See Martinez v. Schriro*, 623 F.3d 731, 734 (9th Cir. 2010) (decision below) (describing state court procedural history). When Martinez sought review of this Sixth Amendment claim in federal habeas proceedings, both the district court and United States Court of Appeals for the Ninth Circuit held that state habeas counsel's failure to raise this claim in the original state habeas proceeding did not set forth a sufficient reason to permit review in federal habeas proceedings because there was no right to effective assistance of counsel in a state postconviction proceeding even when that was the first proceeding in which the claim could be raised. *See id.* at 734-43. Thus, no state or federal court has reviewed the merits of Martinez's claim that his trial counsel failed to act as counsel within the meaning of the Sixth Amendment.

SUMMARY OF ARGUMENT

Federal constitutional claims are regular fare in state court criminal prosecutions. In our system

of federalism, the state judiciary has the very same obligation as does the federal judiciary to enforce federal rights when they arise in state judicial proceedings.

While enforcement of some federal rights has long taken place in the postconviction process, in the wake of the Court's incorporation decisions in the 1960's and early 1970's, the federal habeas remedy provided a more viable and developed forum than did state postconviction remedies. At that time, numerous state postconviction systems were ill-equipped for such claims. More recent decisions from this Court, and congressional amendments to the federal habeas statute, have sharply reduced the role of the federal habeas courts and certified the state postconviction process as the primary forum for the development and litigation of federal claims that cannot practically be asserted at trial or on direct appeal.

While all states today have enacted modern postconviction remedies, many have incorporated statutes of limitations, various waiver doctrines, and other procedures that render the postconviction remedy both complex and uncharitable to error or mistake. At the same time, most of these systems fail to provide the essentials tools for the full development and reliable adjudication of claims that require extra-record evidence.

In the present case, it appears that Martinez's court-appointed appellate counsel did not represent him adequately in state postconviction proceedings with respect to a Sixth Amendment trial counsel

ineffective assistance claim. Arizona law forbids asserting such a claim before postconviction proceedings. The pleaded claim, which required investigation and evidentiary development, does not appear to be frivolous – indeed, it could be meritorious – and yet no court, state or federal, has reviewed its merits due to counsel's failings. Where a state does not provide reasonably competent counsel in a first state postconviction proceeding that concerns a federal claim that could not have been raised in earlier proceedings, the indigent prisoner cannot be held to have defaulted that claim. Given the increasing importance of state postconviction proceedings, we believe the Court's holdings in *Douglas v. California*, 372 U.S. 353 (1963), and *Halbert v. Michigan*, 545 U.S. 605 (2005), provide state postconviction petitioners a right to the effective assistance of counsel at first tier review, at least with respect to a federal constitutional claim subject to review for the first time.

ARGUMENT

I.

In Our System Of Federalism, Both State Courts And Federal Courts Are Charged To Protect And Enforce Federal Constitutional Rights.

We begin with first principles. The state and federal courts have long shared the same responsibility to protect and enforce federal constitutional rights. More than a century ago, this Court recognized that state courts are "subject also to the laws of the United

States," and a state is "just as much bound to recognize these as operative within the State as it is to recognize the State laws. The two together form one system of jurisprudence, which constitutes the law of the land for the State. . . ." *Claflin v. Houseman*, 93 U.S. 130, 137 (1876). As part of the original design of our collective national judiciary, "the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country. . . ." *Id.*

Succeeding decisions have repeatedly reaffirmed this fundamental principle. In *Robb v. Connolly*, 111 U.S. 624, 637 (1884), the Court observed that "[u]pon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . . , whenever those rights are involved in any suit or proceeding before them. . . ." In so concluding, the Court reasoned that the Judiciary Act of 1789 declared that the original jurisdiction of United States circuit courts was "concurrent with the courts of the several states." *Id.* at 636. Moreover, state court judges, sworn as we are to uphold the U.S. Constitution and laws made in pursuance thereof, are fully competent to determine when proceedings are in conformity with federal constitutional rights. *Id.* at 637, 639. *See also Mooney v. Holohan*, 294 U.S. 103, 113 (1935) (relying on *Robb*, 111 U.S. at 637); *Schneckloth v. Bustamonte*, 412 U.S. 218, 259 (1973) (Powell, J., concurring) ("It is the solemn duty of [state] courts, no less the federal ones, to safeguard

personal liberties and consider federal claims in accord with federal law.").

Although federal and state courts are partners "equally bound to guard and protect rights secured by the Constitution," working on this project in tandem requires that one system be adaptive to the other. *Ex Parte Royall*, 117 U.S. 241, 251 (1886). For example, as this Court long ago recognized, state courts have the initial responsibility to protect and enforce federal constitutional rights; efficiency under our system of federalism requires that federal courts decline consideration of the federal constitutional claims brought by state petitioners until *after* state courts have had an opportunity to review them. *Id.* at 251. This doctrine, grounded in principles of comity, normally mandates that state remedies be exhausted before a federal claim can be brought in federal court. *See, e.g.*, *Ex Parte Hawk*, 321 U.S. 114, 117 (1944) ("[I]t is a principle controlling all habeas corpus petitions to the federal courts, that those courts will interfere with the administration of justice in the state courts only in rare cases where exceptional circumstances of peculiar urgency are shown to exist.") (internal quotation marks omitted); *Rose v. Lundy*, 455 U.S. 509, 519 (1982). Likewise, although a federal court has the power to look beyond the procedural default of a claim in state court, federal courts ordinarily decline to exercise this discretion, unless a defendant can demonstrate "cause" and "actual prejudice resulting from the alleged constitutional violation." *Wainwright v. Sykes*, 433 U.S. 72, 84 (1977); *see also Smith v. Murray*, 477 U.S. 527, 533 (1986).

II.

The Federal Habeas Courts Assumed The Lead In Enforcing Federal Rights During The 1960's-1970's Due To The Lack Of Viable State Postconviction Remedies.

Prior to the 1960's, enforcement of the few then-applicable federal constitutional rights in state postconviction proceedings was a rare event. Early on, state postconviction review was available through the common law writs of habeas corpus and coram nobis. In nearly all of the states, review was limited to whether the trial court had jurisdiction or whether the sentence exceeded the statutory maximum. One habeas scholar reports that from 1848 to 1900, only ten state postconviction decisions were reported from five states; by 1916 there were only 30 such decisions, and by 1931, the number had risen to roughly 85. *See* Donald E. Wilkes, Jr., *State Postconviction Remedies and Relief Handbook*, Vol. 1, § 2:4 (West 2010) ("Wilkes").

In the 1940's and 1950's, the number of reported cases brought in state postconviction proceedings increased considerably, in large part due to this Court's interest in coerced confessions and right to counsel issues.[2] Such cases also demonstrated the inadequacy

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[2] *See Ashcraft v. Tennessee*, 322 U.S. 143 (1944) (coerced confession); *Betts v. Brady*, 316 U.S. 455 (1942) (right to counsel); *Smith v. O'Grady*, 312 U.S. 329 (1941) (involuntary plea and right to counsel); *Chambers v. Florida*, 309 U.S. 227 (1940) (coerced confessions).

of review provided by state postconviction systems. For example, in *Smith v. O'Grady*, the petitioner alleged that he had been duped into pleading guilty without adequate notice of the charge or punishment, and without the assistance of counsel. 312 U.S. 329, 332-33 (1941). The Nebraska state trial court denied Smith's habeas petition without requiring an answer or providing Smith "an opportunity to prove his allegations," and the state supreme court affirmed without opinion. *Id.* at 330. After this Court concluded that Smith had stated a claim upon which relief could be granted, it remanded the case back to the state court – notwithstanding the State's suggestion that, under Nebraska law, Smith could not assert federal rights in a habeas corpus proceeding – with instructions that, if Smith could prove his allegations, his conviction could not stand. *Id.* at 334.

In 1948, the Court granted certiorari to review an Illinois conviction, but noted "[w]e are once again faced with the recurring problem of determining what, if any, is the appropriate post-trial procedure in Illinois by which claims of infringement of federal rights may be raised." *Young v. Ragen*, 337 U.S. 235, 236 (1949). As the Court observed, "of course" a state "may choose the procedure it deems appropriate for the vindication of federal rights." *Id.* at 238. The Court made clear, however, that "it is not simply a question of state procedure when a state court of last resort closes the door to *any* consideration of a claim of denial of a federal right." *Id.* Accordingly, the Court in *Young* "articulated the principle that the States

must afford prisoners some 'clearly defined method by which they may raise claims of denial of federal rights,'" *Case v. Nebraska*, 381 U.S. 336, 337 (1965) (Clark, J., concurring) (quoting *Young*, 337 U.S. at 239). The Court remanded the case, and asked the state court to inform it "[i]f there is now no post-trial procedure by which federal rights may be vindicated. . . ." *Young*, 337 U.S. at 239.[3]

In 1965, the Court agreed "to decide whether the Fourteenth Amendment requires that the States afford state prisoners some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees." *Case*, 381 U.S. at 337. Case alleged that his trial counsel had performed ineffectively in violation of the Sixth Amendment. The Nebraska Supreme Court recognized that the allegations, if true, would establish a federal constitutional violation. *Id.* at 336. But it denied relief, holding that its common law habeas corpus remedy was limited to claims alleging either that the trial court lacked jurisdiction, or that the petitioner's sentence was in excess of the statutory limit. *Id.* at 337. This Court ultimately dismissed the case after Nebraska became the seventh state to adopt a "modern

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[3] Shortly thereafter, Illinois became the first state to enact a modern postconviction remedies statute. *See* Wilkes, Vol. 1, § 2:5 at 39-40 (describing Illinois Post-Conviction Hearing Act of 1949). It authorized relief for constitutional violations or other basic rights, generally lifted procedural obstacles to relief, and was designed to be used instead of traditional habeas corpus and common law coram nobis remedies.

procedure for testing federal claims in the state courts" by passing a postconviction statute while the case was pending, but not before the Court implored the remaining states to adopt similar postconviction review mechanisms. *Id.* at 340.

This was the context for the Court's announcement of its seminal decisions in *Fay v. Noia*, 372 U.S. 391 (1963), and *Townsend v. Sain*, 372 U.S. 293 (1963), which transformed the federal habeas remedy. In *Noia*, the Court held that federal habeas courts could adjudicate federal claims brought by state prisoners even if the petitioner had failed to present the claim at available state processes, so long as the applicant had not deliberately bypassed state remedies. A finding of deliberate bypass required that the petitioner himself intentionally forewent state procedures; accordingly, it did not encompass errors by petitioner's counsel. *See Noia*, 372 U.S. at 438-39. In *Townsend*, as discussed *infra*, the Court articulated a more expansive view of the federal habeas courts' power to conduct evidentiary development of claims asserted by state prisoners.

This Court's decisions in *Noia* and *Townsend*, and grant of review in *Case*, stimulated reform of state postconviction procedures throughout the country so that "by the end of 1965 a total of 40 states had to one degree or another significantly expanded their postconviction relief machinery. . . ." Wilkes, Vol. 1, § 2:5 at 42. Yet much of the evidentiary development of federal claims raised in the state postconviction courts would continue to take place in the federal

habeas courts. Indeed, *Noia* and *Townsend*, along with the Court's incorporation of many of the federal bill of rights into the Fourteenth Amendment, led to a huge increase in federal habeas filings by state petitioners. In 1961, while there were nearly 196,000 state prisoners, the federal courts received only 1,020 federal habeas petitions. By 1982, while the number of state prisoners had doubled to more than 384,000, the number of habeas petitions filed by state prisoners multiplied almost eightfold, to 8,059.[4]

Evidentiary development in federal court has led to the correction of numerous unconstitutional, and fundamentally unjust, state court convictions and sentences. *See, e.g.*, *Miller v. Pate*, 386 U.S. 1, 2-6 (1967) (prosecution deliberately presented false evidence – *viz.*, that shorts were stained with the victim's blood type when the shorts were actually stained with paint – to obtain capital conviction); *Dobbs v. Turpin*, 142 F.3d 1383, 1386, 1388-89 (11th Cir. 1998) (trial counsel failed to investigate and present mitigating evidence at penalty phase of capital trial, because, *inter alia*, counsel thought mitigating evidence was inadmissible); *Guerra v. Johnson*, 90 F.3d 1075, 1076-80 (5th Cir. 1996) (prosecution repeatedly suppressed eyewitness evidence exonerating the petitioner, and the police and prosecutors threatened witnesses); *Henderson v. Sargent*, 926 F.2d 706, 710-14 (8th Cir. 1991)

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[4] *See* U.S. Department of Justice, Bureau of Justice Standards, *Habeas Corpus, Federal Review of State Prisoner Petitions* at 3 (March 1984).

(trial counsel and state postconviction counsel failed to investigate readily available evidence implicating the victim's husband as the true murderer in this capital case, notwithstanding obvious leads in police file); *Harris v. Reed*, 894 F.2d 871, 877-79 (7th Cir. 1990) (trial counsel presented no evidence and failed to interview two men who saw the primary alternate suspect fleeing from the scene, even though counsel's opening statement told jurors they would hear evidence about the alternate suspect); *Troedel v. Dugger*, 828 F.2d 670 (11th Cir. 1987), *aff'g* 667 F. Supp. 1456, 1458-60 (S.D. Fl. 1986) (the prosecution knew the crucial "expert" testimony it presented at trial – that the petitioner had fired the murder weapon – was scientifically invalid); *Walker v. Lockhart*, 763 F.2d 942 (8th Cir. 1985) (en banc) (the State suppressed a transcript for over two decades, in which the principal alternate suspect stated: "I did shoot at that policeman."); *Lindsey v. King*, 769 F.2d 1034, 1036, 1038-40 (5th Cir. 1985) (prosecutor in a capital trial purposefully suppressed a police report showing that a key prosecution eyewitness – directly contrary to his trial testimony – told police he did not see the perpetrator's face).

III.

The Court And Congress Define A Narrower, Secondary Role For The Federal Habeas Courts.

The late 1980's and 1990's witnessed a substantial contraction of federal habeas corpus review. The logic driving much of this contraction was that state

postconviction courts have a duty to vindicate federal constitutional rights, and that the state courts could be counted on to provide fair procedures for doing so.

Federal habeas has contracted in two principal ways. First, the number of cases in which federal courts may develop new facts has been sharply reduced. Second, federal review of state court merits rulings has been constrained.

In 1991, two decisions of this Court reduced federal habeas courts' authority to review state court merits rulings on federal claims. In *McCleskey v. Zant*, 499 U.S. 467, 493 (1991), the Court announced that the deliberate bypass standard announced in *Fay v. Noia* would be replaced by a cause and prejudice standard for successive habeas petitions. Cause and prejudice, unlike deliberate bypass, requires that petitioners normally "bear the risk of attorney error," *Murray v. Carrier*, 477 U.S. 478, 488 (1986). The same year, the Court directly overruled *Noia* – which had been eroded beginning with *Francis v. Henderson*, 425 U.S. 536 (1976), and *Wainwright v. Sykes*, *supra*, – and replaced the deliberate bypass standard with the cause and prejudice standard for all independent and adequate state procedural defaults. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

The following year, this Court narrowed federal habeas courts' authority to engage their fact-finding function. Under *Townsend*, an evidentiary hearing was required in federal habeas proceedings if, *inter alia*, the petitioner stated a claim for relief and the facts

were not adequately developed in state court, unless the petitioner deliberately bypassed state court procedures. *See Townsend*, 372 U.S. at 312, 314, 317. In *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), this Court overruled *Townsend* in part, holding that cause and prejudice applies in this context as well. 504 U.S. at 5-6, 11. Thus, under *Keeney*, errors by state postconviction counsel in developing facts normally deprived the petitioner of a mandatory federal evidentiary hearing. There was a "narrow exception" for petitioners who could "show that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing." *Id.* at 11-12.

Four justices dissented in *Keeney*, arguing that deliberate bypass remained the correct standard in the evidentiary hearing context. In Justice Kennedy's words: "[W]e consider today only those habeas actions which present questions federal courts are bound to decide in order to protect constitutional rights. We ought not to take steps which diminish the likelihood that those courts will base their legal decision on an accurate assessment of the facts." *Id.* at 24 (dissenting opinion); *see also id.* at 15-18 (O'Connor, J., dissenting) (noting that, when the reliability of state fact-finding is doubtful because crucial evidence was not presented, federal habeas courts have long examined facts anew: "As Justice Holmes wrote for the Court . . . : 'It does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself when if true as alleged they make the trial absolutely void.'") (quoting *Moore v. Dempsey*, 261 U.S. 86, 92 (1923)).

The majority in *Keeney*, however, emphasized that state courts are capable of providing adequate process to ensure that relevant facts are developed in state court. "The state court is the appropriate forum for resolution of factual issues in the first instance . . . ," wrote the *Keeney* majority, and "[j]ust as the State must afford the petitioner a full and fair hearing on his federal claim, so must the petitioner afford the State a full and fair opportunity to address and resolve the claim on the merits." 504 U.S. at 9-10. The Court further explained that the purpose of requiring petitioners to develop facts in state court "is not to create a procedural burden on the path to federal habeas court, but to channel claims into an appropriate forum, where meritorious claims may be vindicated and unfounded litigation obviated before resort to federal court." *Id.* at 10; *see also id.* at 9 ("[E]ncouraging the full factual development in state court of a claim that state courts committed constitutional error advances comity by allowing a coordinate jurisdiction to correct its own errors in the first instance.").[8]

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[8] Before Congress's enactment of the Antiterrorism and Effective Death Penalty Act in 1996, this Court restricted the ability of federal habeas courts to grant relief to state prisoners in two additional respects. *Teague v. Lane*, 489 U.S. 288 (1989), held that new rules of law could no longer be announced or applied in federal habeas proceedings. *Brecht v. Abrahamson*, 507 U.S. 619 (1993), held that the *Chapman v. California*, 386 U.S. 18 (1967) harmless error standard would no longer apply in habeas proceedings; instead, the standard first promulgated in

(Continued on following page)

In 1996, Congress enacted numerous amendments to the federal habeas statute. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"). These amendments sought to make the federal review process faster and more final. Effectively, these amendments also rendered the state judiciary not only the front-line defender of federal constitutional rights, but often the last-line defender as well.

One of AEDPA's provisions is 28 U.S.C. § 2254(e)(2). This Court has interpreted § 2254(e)(2) as codifying *Keeney*'s holding that, where the petitioner or his counsel failed to develop facts diligently in state court, the petitioner must meet a heightened standard to obtain a federal hearing. *See (Michael) Williams v. Taylor*, 529 U.S. 420, 432-33, 439-40 (2000); *see also Holland v. Jackson*, 542 U.S. 649, 653 (2004) (per curiam). However, § 2254(e)(2) also supersedes *Keeney* in part, making that heightened standard even more difficult to meet. The statute replaces *Keeney*'s cause-and-prejudice test and freestanding miscarriage-of-justice exception with a test requiring petitioners to establish *both* a particular type of cause, 28 U.S.C. § 2254(e)(2)(A), *and* a miscarriage of justice under an especially stringent standard, 28 U.S.C. § 2254(e)(2)(B). *See (Michael) Williams*, 529 U.S. at 433.

Kotteakos v. United States, 328 U.S. 750 (1946) (error "had substantial and injurious effect or influence in determining the jury's verdict") would apply to all claims raised in habeas petitions.

Similar to this Court's logic in *Keeney*, § 2254(e)(2) is "premised upon recognition by Congress . . . that state judiciaries have the duty and competence to vindicate rights secured by the Constitution in state criminal proceedings." *Id.* at 436-37. The statute's rigorous requirements for a federal hearing thus apply only if the petitioner is at fault for failing to develop evidence in state court. *Id.* at 437. Although federal habeas courts "are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings," "comity is not served by" barring a federal hearing where the prisoner "was unable to develop his claim in state court despite diligent effort." *Id.*; *see also id.* at 436 ("Federal habeas corpus principles must inform and shape the historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts.").

In addition to further limiting the scope of factual development in federal habeas cases, AEDPA substantially contracted federal habeas review of state court merits rulings. Before AEDPA, state court rulings on purely legal issues and mixed questions of fact and law were reviewed *de novo* in federal habeas proceedings. *See (Terry) Williams v. Taylor*, 529 U.S. 362, 400 (2000). Under AEDPA, however, a federal habeas court may grant relief on a claim adjudicated on the merits in state court only if the legal ruling "was contrary to, or involved an unreasonable application of," a prior decision by this Court. 28 U.S.C. § 2254(d)(1). Moreover, even in those cases where

factual development is permitted in federal court, only those facts presented in state court may be considered as part of this § 2254(d)(1) review. *See Cullen v. Pinholster*, 563 U.S. ___, 131 S. Ct. 1388, 1398 (2011).

AEDPA similarly contracted the scope of federal habeas review of state court merits rulings based on contested factual determinations. Under pre-AEDPA law, state court factual determinations were normally presumed to be correct in federal habeas, but there were eight statutory exceptions to that presumption. *See Jefferson v. Upton*, 560 U.S. ___, 130 S. Ct. 2217, 2221 (2010) (citing pre-1996 version of 28 U.S.C. § 2254(d)). If, for example, material facts were not adequately developed in the state court hearing, the presumption of correctness was inapplicable. *See* 28 U.S.C. § 2254(d)(3) (1994). By contrast, under AEDPA, there are no express limitations on the presumption that state court fact-findings are correct, *see* 28 U.S.C. § 2254(e)(1), and federal habeas courts are limited to reviewing the state court record in determining whether a state court decision is based on an unreasonable determination of the facts, *see* 28 U.S.C. § 2254(d)(2).

AEDPA's limitations on federal habeas review of state court merits rulings once again reflect the fundamental principle that "state courts are the principal forum for asserting constitutional challenges to state convictions." *Harrington v. Richter*, 562 U.S. ___, 131 S. Ct. 770, 778 (2011); *see also Pinholster*, 131 S. Ct. at 1399 ("'The federal habeas scheme leaves primary responsibility with the state courts[.]'") (quoting *Woodford v. Visciotti*, 537 U.S. 19, 27 (2002)).

Although federal habeas continues to "stand[ ] as a safeguard against imprisonment of those held in violation of the law," *Harrington*, 131 S. Ct. at 780, 28 U.S.C. § 2254(d), as amended by AEDPA, "reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction[.]" *Id.* at 786 (internal quotation marks omitted).

In light of this significant contraction of federal habeas review, it is now imperative that the state postconviction courts possess the means to provide for the full development and reliable adjudication of federal claims raised for the first time and at the first tier in those proceedings.

IV.

Current State Postconviction Remedies Fail To Guarantee A Full Opportunity To Develop Federal Claims That Cannot Be Asserted At Trial Or On Direct Appeal.

Much has changed in the state postconviction process since the Court's grant of review in *Case v. Nebraska* to decide whether the federal constitution required States to have "some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees." 381 U.S. at 337.

Either by statute or court rule, every state and the District of Columbia has a modern postconviction remedy system. *See* Wilkes, Vol. 1, § 1:3. In each,

claims alleging the trial court lacked jurisdiction, or that the conviction or sentence was obtained in violation of state or federal constitutional rights are cognizable. *Id.* at § 1:4. In thirty-four states, newly discovered evidence of innocence is a cognizable ground for relief. *Id.*

These systems, however, are not simple, straightforward remedies that *pro se* applicants can safely navigate. All are governed by an increasingly complex set of rules and procedures that regulate nearly every step in the process – when the petition must be filed, which claims are and are not cognizable, how thoroughly each claim must be presented, which rules of law apply (or do not apply), etc.[6] For example, in nearly all jurisdictions, claims that were, or could have been, raised on direct appeal will not be considered.[7] Thirty-seven states have enacted statutes of

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[6] Two retired Alabama appellate jurists recently characterized the Alabama postconviction process in similar terms. *See* Brief of *Amici Curiae* Alabama Appellate Court Justices and Bar Presidents in Support of Petitioner in *Maples v. Thomas*, No. 10-63 at 29 ("Alabama's postconviction process is governed by exceptionally complex procedural rules, unyielding deadlines, demanding pleading requirements, and very short time periods during which to navigate the maze. The rules are so complex, and often so unyielding, that an inmate who is not represented by competent counsel has little chance of survival.").

[7] *See, e.g.*, *Lamarca v. State*, 931 So. 2d 838, 851 n.8 (Fla. 2006) (claims that could have been raised on direct appeal are barred in postconviction proceedings); *People v. Petrenko*, 931 N.E.2d 1198, 1204 (Ill. 2010) (same); *Mills v. State*, 868 N.E.2d 446, 452 (Ind. 2007) (same); *Loden v. State*, 43 So. 3d 365, 377 (Miss. 2010) (same).

limitation that apply to some or all postconviction cases. Wilkes, Vol. 1, § 1:6 at 10-11. Some begin to run as early as from the date of sentencing;[8] others do not begin until the completion of direct appeal. In states with no limitation period, case law provides that prejudicial delay in filing may result in dismissal of the petition.[9] *Id.* at § 1:6. Numerous states have adopted heightened pleading requirements for all asserted claims.[10] It is not enough to identify the claim, the applicable constitutional provision, and then plead a core set of facts in support thereof. In many states, petitioners must identify and plead all possible claims in the first application as successor or successive petitions are rarely allowed.

This new complexity strongly suggests the necessity of counsel, at least for federal claims that cannot be asserted in earlier state proceedings. Currently, only twenty-eight states make some provision for counsel in postconviction proceedings in non-capital cases; fifteen states provide counsel for capital proceedings only; in the District of Columbia and seven other states – Alabama, Delaware, Georgia, Massachusetts,

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[8] *See State v. Milne*, 842 A.2d 140, 143 (N.J. 2004).

[9] *See Walker v. Martin*, 562 U.S. ___, 131 S. Ct. 1120 (2011).

[10] Under Alabama postconviction law, "[t]he petition must contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds." Ala. R. Crim. P. 32.6(b). Tennessee law has the same specificity requirement. *See* Tenn. Code Ann. § 40-30-106(d).

Michigan, Nebraska, and New Hampshire – there is no right to counsel in postconviction proceedings. Wilkes, Vol. 1, § 1:5.

Even in those states that make provision for counsel in non-capital cases, appointment is not a matter of right, and is often made contingent on various factors. In Colorado, for example, there is "a limited statutory right to postconviction counsel"; in most instances, the court will send the case to the public defender to determine whether counsel is necessary. *See Silva v. People*, 156 P.3d 1164 (Colo. 2007). This is also the rule in Ohio. *See* Ohio Rev. Code Ann. § 120.06(A)(3). In Florida, the court has discretion to appoint counsel and must consider four factors before making an appointment. *See Bynum v. State*, 932 So. 2d 361 (Fla. App. 2006) (relevant factors are (1) the adversary nature of the proceeding; (2) its complexity; (3) the need for an evidentiary hearing; and (4) the need for substantial legal research). In Louisiana, counsel is appointed only if the court orders an evidentiary hearing or if discovery is to be taken. *See* La. Code Crim. P. Art. 930.7.

Empirical studies reveal that, even in jurisdictions with a statutory counsel provision, counsel is not appointed in the vast majority of non-capital habeas cases. One study looked at habeas practice in San Diego trial-level courts in the early 1990's. A review of 312 case files showed that *pro per* petitioners filed their own petitions and sought the appointment of counsel in 71 cases; the courts appointed counsel in only two of those cases. *See* Perrello &

Delzeit, *Habeas Corpus in San Diego Superior Court (1991-1993): An Empirical Study*, 19 T. Jefferson L. Rev. 283, 285-86 (1997). According to the study, "[t]he San Diego petitions examined were usually denied without factual investigation, without appointment of counsel, and without hearings. There is usually no analysis of the merits in the decisions." *Id.* at 288.

Similarly, while many postconviction schemes make allowance for discovery and for evidentiary development, discovery is available only at the court's discretion and requires that the petitioner first demonstrate a substantial need. In Washington and Oklahoma, for example, discovery is conditioned upon a showing of "good cause." *See* Wash. R. App. P. 16.12; Okla. Stat. Ann., tit. 22 § 1083(a). In Pennsylvania, no discovery is available except by leave of the court and with a showing of exceptional circumstances. *See* Pa. Cons. Stat. Ann., tit. 42 § 9545(d)(2).

Our knowledge and review of the current postconviction systems persuades us that although state postconviction remedies have improved significantly during the past three decades, access to the tools necessary for petitioners to adequately plead and develop their claims is inconsistent. Whether a state postconviction system in fact provides a forum for the development of federal claims that cannot be asserted earlier is largely determined by the discretionary decisions of the courts to appoint counsel, provide adequate funding for investigation and experts where appropriate, and allow discovery.

V.

Indigent Petitioners In State Postconviction Proceedings Require Effective Counsel To Adequately Litigate At First Tier Review Those Federal Claims That Cannot Be Asserted Earlier.

In the wake of this Court's ruling in *Cullen v. Pinholster*, *supra*, it is clear to us that state petitioners who allege non-frivolous federal claims that could not have been asserted earlier must have a fair opportunity to do so at the first tier in their original state postconviction proceeding. The state courts' equal partnership in our system of federalism requires no less. It is also clear to us that only the most unusual incarcerated prisoner would have the means to develop such claims without the services of able counsel who are reasonably compensated, and who, when necessary, have access to investigative and expert assistance, and to formal discovery.

It also seems to us that the original state postconviction process in this case failed to work properly due to appointed counsel's ineffective representation. Because this was the very first opportunity for Martinez to air his trial counsel ineffective assistance claim, his claim should not be forever precluded. The Court's decisions in *Douglas v. California*, *supra*, and *Halbert v. Michigan*, *supra*, would seem to control here because this was Martinez's first opportunity to raise his federal claim, a claim that depended upon extra-record fact development, and his appointed appellate counsel apparently failed to perform adequately.

CONCLUSION

For the reasons stated above, amici curiae request that the judgment of the Ninth Circuit be reversed.

Respectfully submitted,

PIERRE H. BERGERON
SQUIRE SANDERS &
DEMPSEY (US) LLP
221 E. Fourth Street,
Suite 2900
Cincinnati, OH 45202
513.361.1200

ALISON E. KLINGEL
SQUIRE SANDERS &
DEMPSEY (US) LLP
1 E. Washington Street,
Suite 2700
Phoenix, AZ 85004
602.528.4000

GEORGE H. KENDALL
Counsel of Record
SAMUEL SPITAL
CORRINE IRISH
CARINE WILLIAMS
SQUIRE SANDERS &
DEMPSEY (US) LLP
30 Rockefeller Plaza
New York, NY 10112
212.872.9800
george.kendall@ssd.com

AMICUS CURIAE BRIEF

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LUIS MARIANO MARTINEZ,

Petitioner,

—v.—

CHARLES L. RYAN, Director,
Arizona Department of Corrections,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE INNOCENCE NETWORK IN SUPPORT OF PETITIONER

KEITH A. FINDLEY
PRESIDENT
THE INNOCENCE NETWORK
University of Wisconsin
Law School
975 Bascom Mall
Madison, Wisconsin 53706
(608) 262-4763

JAMES P. ROUHANDEH,
Counsel of Record
REBECCA WINTERS
MICAH J. COGEN
KATHERINE A. MARSHALL
ALAN J. TABAK
DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, New York 10017
(212) 450-4000
rouhandeh@davispolk.com

Attorneys for Amicus Curiae

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. INEFFECTIVE ASSISTANCE OF COUNSEL IS A LEADING CONTRIBUTOR TO WRONGFUL CONVICTIONS 3

A. Wrongful Conviction as a Result of Deficient Trial Counsel Is a Significant Problem, Especially for Indigent Defendants 3

B. Specific Instances In Which Ineffective Assistance of Counsel Has Been a Leading Contributor to a Wrongful Conviction 7

II. FIRST-TIER REVIEW BY COUNSEL IS CRITICAL TO THE IDENTIFICATION AND DEVELOPMENT OF CLAIMS BASED ON INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL 11

PAGE

A. *Pro Se* Defendants Face Insurmountable Difficulty in Identifying and Prosecuting Claims of Ineffective Assistance of Trial Counsel 11

B. A Defendant's First Opportunity to Raise a Claim of Ineffective Assistance of Trial Counsel May Not Arise on Direct Appeal 17

C. Counsel Is Required for First-Tier Review of Ineffective Assistance of Trial Counsel Claims, Even if Such Review Occurs Outside of Direct Appellate Review..... 21

CONCLUSION..... 23

TABLE OF AUTHORITIES

Cases PAGE

Cleveland v. State,
241 P.3d 504 (Alaska Ct. App. 2010) ... 16

Dodson v. State, 326 Ark. 637,
934 S.W.2d 198 (Ark. 1996) 21

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146 F.3d 1257 (10th Cir. 1998) 12, 22

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459 F. Supp. 2d 267 (S.D.N.Y. 2006) ... 10

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683 So. 2d 17 (Ala. 1996) 13

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545 U.S. 605 (2005) 16, 17, 22

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639 N.W.2d 523 (S.D. 2002) 12

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No. 95 CV 1224, 1996 WL 225021
(E.D. La. May 2, 1996) (unreported) ... 8

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796 So. 2d 1227
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PAGE

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538 U.S. 500 (2003) 14, 18, 19, 20, 23

Melendez-Diaz v. Massachusetts,
129 S. Ct. 2527 (2009) 15

Miller v. Anderson,
255 F.3d 455 (7th Cir. 2001) 15

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484 S.E.2d 101 (S.C. 1997) 13

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No. 2004-2096-FH (Macomb Cnty.
Cir. Ct. Nov. 20, 2009) 7-8, 14

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741 N.E.2d 1026 (Ill. App. Ct. 2000) ... 13

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4th 960, 175 P.3d 4 (Cal. 2008) 20

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PAGE

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PAGE

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Donald J. Farole, Jr. & Lynne Langdon, Bureau of Justice Statistics, U.S. Dep't of Justice, *Census of Public Defender Offices, 2007: County-based and Local Public Defender Offices, 2007* (Sept. 2010) 5

PAGE

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PAGE

Know the Cases: Earl Washington, The Innocence Project, http://www.innocenceproject.org/Content/Earl_Washington.php 10

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INTEREST OF *AMICUS CURIAE*[1]

The Innocence Network is an association of organizations dedicated to providing *pro bono* legal and/or investigative services to prisoners for whom evidence discovered post-conviction can provide conclusive proof of innocence. The 66 current members of the Innocence Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Australia, Canada, the United Kingdom, and New Zealand.[2] The work of the Innocence Network and

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[1] Pursuant to Rule 37.3(a), letters from the parties consenting to the filing of this brief are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than the *amicus curiae*, its members, or its counsel made any monetary contribution to the preparation or submission of this brief.

[2] The member organizations include the Alaska Innocence Project, Association in Defense of the Wrongly Convicted (Canada), California Innocence Project, Center on Wrongful Convictions, Connecticut Innocence Project, Downstate Illinois Innocence Project, Duke Center for Criminal Justice and Professional Responsibility, The Exoneration Initiative, Georgia Innocence Project, Hawaii Innocence Project, Idaho Innocence Project, Innocence Network UK, Innocence Project, Innocence Project Arkansas, Innocence Project at UVA School of Law, Innocence Project New Orleans, Innocence Project New Zealand, Innocence Project Northwest Clinic, Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of South Dakota, Innocence Project of Texas, Justice Project, Inc., Kentucky Innocence Project, Maryland Innocence Project, Medill Innocence Project, Michigan Innocence Clinic, Mid-Atlantic Innocence Project, Midwestern Innocence Project, Mississippi Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence Project, Northern Arizona Justice Project, Northern California Innocence Project, Office of the Public Defender (State

its members has revealed wrongful convictions due in whole or in part to inadequate trial counsel. The Innocent Network has a direct interest in ensuring that criminal defendants are afforded effective assistance of counsel at trial and, to that end, that defendants also have access to counsel on first-tier review of claims of ineffective trial counsel, so as to reduce the likelihood of wrongful convictions. The Innocence Network therefore respectfully files this *amicus curiae* brief in support of Luis Martinez's petition.

SUMMARY OF ARGUMENT

Ineffective trial counsel is a substantial contributor to wrongful convictions, particularly for indigent criminal defendants. Claims of ineffective assistance of trial counsel serve as a primary vehicle both for these defendants to protect their constitutional right to a fair trial and for courts to protect the integrity of the judicial process. Because ineffective assistance claims are often legally and factually complex, non-lawyers are poorly equipped to litigate them, as this Court has

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of Delaware), Office of the Ohio Public Defender, Wrongful Conviction Project, Ohio Innocence Project, Osgoode Hall Innocence Project (Canada), Pace Post-Conviction Project, Palmetto Innocence Project, Pennsylvania Innocence Project, Reinvestigation Project (Office of the Appellate Defender), Rocky Mountain Innocence Center, Sellenger Centre Criminal Justice Review Project (Australia), Texas Center for Actual Innocence, Texas Innocence Network, Thomas M. Cooley Law School Innocence Project, Thurgood Marshall School of Law Innocence Project, University of British Columbia Law Innocence Project (Canada), Wake Forest University Law School Innocence and Justice Clinic, Wesleyan Innocence Project, Wisconsin Innocence Project, and Wrongful Conviction Clinic.

recognized. The first opportunity to bring such claims may not arise on direct appeal. Indeed, the State of Arizona affirmatively prohibits criminal defendants from bringing ineffectiveness claims on direct appeal, requiring instead that defendants raise such claims in post-conviction proceedings. But if Respondent is correct that defendants possess no constitutional right to counsel at the first opportunity provided under Arizona law to challenge trial counsel's performance, then the right to effective trial counsel—a core trial right—will effectively become a right without a remedy. The Innocence Network submits this brief in support of Petitioner Luis Martinez, and urges the Supreme Court to affirm the constitutional right to counsel at a criminal defendant's first opportunity to raise his or her ineffectiveness claim.

ARGUMENT

I. INEFFECTIVE ASSISTANCE OF COUNSEL IS A LEADING CONTRIBUTOR TO WRONGFUL CONVICTIONS

A. Wrongful Conviction as a Result of Deficient Trial Counsel Is a Significant Problem, Especially for Indigent Defendants

"Assistance of counsel . . . is critical to the ability of the adversarial system to produce just results." *Strickland v. Washington*, 466 U.S. 668, 685 (1984). But simply "[t]hat a person who happens to be a lawyer is present at a trial alongside the accused . . . is not enough to satisfy" a criminal defendant's Sixth Amendment right to effective trial counsel. *Id.* Where "counsel's conduct so

undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result," a defendant's constitutional right to counsel is violated and the integrity of the judicial process challenged. *Id.* at 692-93.

There is no question that ineffective assistance of counsel results in a substantial number of wrongful convictions. Criminal defendants brought 330 successful ineffective assistance of counsel claims in state court and an additional 122 successful claims in federal court between 2000 and 2006. *See* John H. Blume & Stacey D. Neumann, *"It's Like Deja Vu All Over Again": Williams v. Taylor, Wiggins v. Smith, Rompilla v. Beard and a (Partial) Return to the Guidelines Approach to Effective Assistance of Counsel*, 34 Am. J. Crim. L. 127, 156 (2007). In view of the particularized legal standard set forth in *Strickland v. Washington* to establish unconstitutional ineffectiveness, and the fact that many claims are raised by incarcerated defendants acting *pro se*, it is likely that many more defendants have been convicted in trials in which they were served by unconstitutionally ineffective trial counsel.

The risk that deficient trial counsel will cause wrongful convictions is widely recognized, particularly in cases where the defendant is indigent. The American Bar Association has noted that "[a]lthough there undoubtedly are a variety of causes of wrongful conviction . . . inadequate representation often is cited as a significant contributing factor." A.B.A. Standing Comm. on Legal Aid and Indigent Defs., *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* 3 (Dec. 2004), *available at* http://www.american-

bar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings_authcheckdam.pdf. Speaking directly to the problems of indigent defense, the A.B.A. concluded: "Taken as whole, glaring deficiencies in indigent defense services result in a fundamentally unfair criminal justice system that constantly risks convicting persons who are genuinely innocent . . . ." *Id.* at 7; *see also* A.B.A., *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 928 (2003) ("The commentary to the first edition of this Guideline noted that 'many indigent capital defendants are not receiving the assistance of a lawyer sufficiently skilled in practice to render quality assistance' and supported the statement with numerous examples. The situation is no better today.").

Among these "deficiencies" is the fact that indigent defense counsel are overworked and understaffed. *See, e.g.*, Donald J. Farole, Jr. & Lynn Langdon, Bureau of Justice Statistics, U.S. Dep't of Justice, *Census of Public Defender Offices, 2007: County-based and Local Public Defender Offices, 2007* 10 (Sept. 2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/clpdo07.pdf (finding that only 27% of county-based public defender offices reported sufficient numbers of litigating attorneys to meet professional guidelines for the number of cases received). As an example, indigent defense counsel often lack sufficient access to essential resources, such as legal and investigative services. *See e.g.*, Cal. Comm'n on the Fair Admin. of Justice, *Official Report and Recommendations on Funding of Defense Services in Cal-*

ifornia 5 (Apr. 14, 2008), *available at* http://www.ccfaj.org/documents/ reports/prosecutorial/official/OFFICIAL%20REPORT%20ON%20DEFENSE%20SERVICES.pdf ("Over two-thirds of judges surveyed indicated that providing sufficient investigative resources for the defense was a problem in their county. In six counties, defenders had no investigative staff."). Similarly, states will often appoint private counsel to represent indigent defendants who have little experience practicing criminal law or representing indigent defendants and, in many cases, will provide no formal training in criminal practice to these lawyers. *See* A.B.A., *Gideon's Broken Promise*, *supra*, at 11, 16-17; *see also* Nat'l Legal Aid & Defender Ass'n, *An Assessment of Indigent Defense Services in Montana* 37 (Aug. 4, 2004), *available at* http://www.nlada.net/sites/default/ files/mt_whitevmartznlada08-04-2004_report.pdf ("There is no orientation program for newly hired indigent defense attorneys, no systematic and comprehensive training, and no technical assistance.").

These factors, along with others, create a system that threatens an indigent defendant's right to effective trial counsel. As United States Attorney General Eric Holder recently remarked:

> As we all know, public defender programs are too many times under-funded. Too often, defenders carry huge caseloads that make it difficult, if not impossible, for them to fulfill their legal and ethical responsibilities to their clients. Lawyers buried under these caseloads often can't interview their clients properly, file appropriate motions, conduct fact investigations, or spare the time needed to ask and

> apply for additional grant funding. And the problem is about more than just resources. In some parts of the country, the primary institutions for the delivery of defense to the poor—I'm talking about basic public defender systems—simply do not exist.

Eric H. Holder, Jr., U.S. Att'y General, Remarks at the Dep't of Justice Nat'l Symposium on Indigent Defense 8-9 (Feb. 18, 2010) (transcript *available at* http://www.ojp.usdoj.gov/BJA/topics/inddef_index.html). In these circumstances, a claim of ineffective assistance may stand as the only safeguard protecting a defendant's constitutional right to a "fair trial, a trial whose result is reliable." *See Strickland*, 466 U.S. at 687.

B. Specific Instances In Which Ineffective Assistance of Counsel Has Been a Leading Contributor to a Wrongful Conviction

The cases described below represent a small sampling of those in which wrongful convictions occurred in whole or in part because trial counsel provided ineffective assistance, and in which defendants were only able to demonstrate trial counsel's inadequacy with the assistance of post-conviction counsel.

- Julie Baumer was convicted of first-degree child abuse after her trial counsel failed to consult with or call a single expert capable of rebutting testimony from the State's experts that CT scans and MRIs of the victim revealed injuries caused by shaking and blunt-force trauma. *People v. Baumer*, No.

2004-2096-FH, slip op. at 1, 7-8 (Macomb Cnty. Cir. Ct. Nov. 20, 2009) (unreported). A state habeas court set aside Baumer's conviction after multiple experts testified that the CT scans and MRIs actually revealed that the injuries were caused by infant stroke, a condition entirely unrelated to the charges against Baumer. *Id.* at 8-9. On retrial, a jury found Baumer not guilty. *See* Emily Bazelon, *Shaken-Baby Syndrome Faces New Questions in Court*, N.Y. Times Mag., Feb. 2, 2011, at 30.

Willie Jackson was convicted of aggravated rape and first-degree robbery based largely on expert testimony that the bite marks on the victim belonged to the defendant. *Jackson v. Day*, No. 95 CV 1224, 1996 WL 225021, at *1-4 (E.D. La. May 2, 1996) (unreported). On habeas review, the district court found that trial counsel's inexplicable failure to request funds to consult with and call an expert who would have testified that bite marks on the victim did not belong to Jackson constituted ineffective assistance of counsel. *Id.* at *4-6. Although the Court of Appeals subsequently disagreed that Jackson suffered any prejudice, *see Jackson v. Day*, No. 96 CV 30563, 1997 WL 450202, at *3 (5th Cir. 1997) (unreported), in 2003—after having already served seventeen years in prison—Jackson was exonerated by DNA evidence. *See Know the Cases: Willie Jackson*, The Innocence Project, http://www.innocenceproject.org/Content/Willie_Jackson.php.

- Appointed counsel to Ronald Williamson in a state capital murder case failed to investigate Williamson's history of severe mental illness, which included diagnoses of schizophrenia, paranoid and borderline personality disorders, and atypical bipolar illness, among others. *Williamson v. Ward*, 110 F.3d 1508, 1514-16 (10th Cir. 1997). As a result, counsel "did not move the court for a competency determination, nor did he suggest at trial that Williamson's dream confessions were not credible because they were the delusional product of Williamson's mental illness." *Id.* at 1516. The Tenth Circuit Court of Appeals overturned Williamson's state conviction on federal habeas review, agreeing with the district court that trial counsel provided prejudicially ineffective assistance. *Id.* at 1520. Then, in preparation for retrial, DNA evidence conclusively exonerated Williamson. *See* Emily M. West, *Court Findings of Ineffective Assistance of Counsel Claims in Post-Conviction Appeals Among the First 255 DNA Exoneration Cases* (Sept. 2010), http://www.innocenceproject.org/ docs/ Innocence_Project_IAC_ Report.pdf.

- Counsel for Earl Washington, Jr. in a state capital murder case failed to investigate evidence presented to him before trial suggesting that semen stains on a blanket in the victim's bedroom did not match Washington's blood type and therefore could not belong to him. *Washington v. Murray*, 4 F.3d 1285, 1286 (4th Cir. 1993). On federal habeas review, the Fourth Circuit found that trial counsel had performed deficiently by failing

to investigate this evidence but, over a vigorous dissent, concluded that Washington did not suffer prejudice. *Id.* at 1290. Washington was later released from prison in 2000 when DNA evidence conclusively showed that, in fact, he could not have been the source of the semen. *Know the Cases: Earl Washington*, The Innocence Project, http://www.innocenceproject.org/Content/Earl_Washington.php.

- Trial counsel to Jose Garcia possessed overwhelming evidence that Garcia was in the Dominican Republic on the day that the State of New York claimed he committed murder in the Bronx. *Garcia v. Portundo*, 459 F. Supp. 2d 267, 271 (S.D.N.Y. 2006). But Garcia's counsel failed to introduce any of this evidence at trial, resulting in Garcia's conviction. *Id.* at 272-73. After Garcia had already spent fifteen years wrongly incarcerated, a federal district court granted his habeas petition, concluding that trial counsel had performed "well below the minimal standards of competence" in this "exceptionally troubling case." *Id.* at 295. Garcia was not retried. *See* Paul Davies & Phil Kuntz, *An Ex-Wife's Battle: Set Mr. Garcia Free—Contesting a Lone Murder Witness Became Ms. Ortega's 15-Year Odyssey*, Wall St. J., June 15, 2007, at A1.

These profiles illustrate the substantial risk and irreparable harm of wrongful conviction that criminal defendants face from ineffective trial counsel. Individuals who should never have been convicted in the first place have spent years incarcerated because of the inadequacy of their counsel and, as

is discussed more fully in Part II, were only able to demonstrate that inadequacy with the assistance of post-conviction counsel.

II. FIRST-TIER REVIEW BY COUNSEL IS CRITICAL TO THE IDENTIFICATION AND DEVELOPMENT OF CLAIMS BASED ON INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

A. *Pro Se* Defendants Face Insurmountable Difficulty in Identifying and Prosecuting Claims of Ineffective Assistance of Trial Counsel

Counsel is critical for litigants to prove—and for courts to assess—both deficient trial counsel performance and resulting prejudice, as required by *Strickland*, 466 U.S. at 697. Generally speaking, to bring an ineffective assistance of counsel claim, a defendant must (a) identify instances where counsel's performance fell below legally permissible standards; (b) conduct an investigation into the facts concerning these issues; and (c) frame these issues in post-conviction briefing in a manner that is legally sufficient. These tasks, which are discussed below in detail, present clear difficulties for *pro se* defendants who, in addition to being indigent, often lack even a high school education, may not be English speakers, and suffer disproportionately from mental health conditions that impair their ability to prosecute such claims.

First, claims of ineffective assistance of trial counsel very often raise complicated legal issues that lay persons cannot reasonably be expected to

identify, much less understand and develop unaided by counsel. *See Kimmelman v. Morrison*, 477 U.S. 365, 378 (1986) ("A layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance."); *English v. Cody*, 146 F.3d 1257, 1263 (10th Cir. 1998) (same). Ineffective assistance of counsel may be based upon a spectrum of conduct—including failure to present alibi evidence, failure to present expert testimony rebutting the State's case, failure to challenge the admissibility of evidence, and failure to challenge jury selections—as illustrated by the following cases, all brought with the assistance of post-conviction counsel. *See, e.g.*, *State v. Faust*, 265 Neb. 845, 883-84, 660 N.W.2d 844, 877 (Neb. 2003) (ineffectiveness found where counsel failed to object to prejudicial and inadmissible testimony on prior bad acts), *overruled in part on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (Neb. 2007); *Kirkland v. State*, 274 Ga. 778, 778-80, 560 S.E.2d 6, 7-8 (Ga. 2002) (ineffectiveness found where counsel failed to challenge for cause jurors with a business relationship to the corporate victim); *Sanchez v. State*, 351 S.C. 270, 272-75, 569 S.E.2d 363, 364-66 (S.C. 2002) (ineffectiveness found where counsel failed to object to hearsay testimony recounting inadmissible statements made by statutory rape victim); *State v. Bishop*, 263 Neb. 266, 276-77, 639 N.W.2d 409, 418 (Neb. 2002) (ineffectiveness found where counsel failed to advise defendant of double jeopardy defense before entry of guilty plea); *Hofman v. Weber*, 2002 SD 11, ¶18, 639 N.W.2d 523, 528-29 (S.D. 2002) (ineffectiveness found where counsel failed to move to suppress involuntary confessions); *Johnson v. State*, 26 Fla.

L. Weekly D2440, 796 So. 2d 1227, 1228-29 (Fla. Dist. Ct. App. 2001) (ineffectiveness found where counsel failed to move to dismiss based on dispositive precedent); *Patterson v. LeMaster*, 130 N.M. 179, 187, 21 P.3d 1032, 1040 (N.M. 2001) (ineffectiveness found where counsel failed to object to unduly suggestive showup procedure); *People v. Jackson*, 318 Ill. App. 3d 321, 326-30, 741 N.E.2d 1026, 1030-33 (Ill. App. Ct. 2000) (ineffectiveness found where counsel failed to move to dismiss after prosecution rested without introducing evidence on a necessary crime element); *Padgett v. State*, 324 S.C. 22, 28-29, 484 S.E.2d 101, 104 (S.C. 1997) (ineffectiveness found where counsel failed to challenge burglary charge when building in question was unoccupied); *Grace v. State*, 683 So. 2d 17, 19-21 (Ala. 1996) (unreported in state reporter) (ineffectiveness found where counsel failed to file written discovery motion that would have resulted in suppression of incriminating statement).

As a practical matter, it is difficult for someone without any legal background first to identify an error and then to determine whether it is sufficient to form the basis of an ineffective assistance of counsel claim. Moreover, even if an inmate were intellectually capable of educating himself or herself concerning the governing law, there are often significant barriers to doing so. For example, incarcerated defendants often have only limited access to libraries and other resources necessary to prosecute their claims. *See* Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1633 (2003) (noting a "marked contraction in the availability of law libraries and other legal services to prison inmates" and citing news reports of prison

law library closures in six states); Elizabeth Greenberg et al., Nat'l Ctr. of Educ. Statistics, U.S. Dep't of Educ., *Literacy Behind Bars: Results from the 2003 National Assessment of Adult Literacy Prison Survey* 62-64 (2007), *available at* http://nces.ed.gov/pubs2007/2007473.pdf (noting that "access to the Internet is typically prohibited within prisons" and that 22% of inmates had to wait between two and six days to access prison libraries, 10% had to wait seven to ten days, and another 10% had to wait more than 10 days to access those facilities).

Second, claims of ineffective assistance of counsel can require extensive post-trial investigation to supplement the trial record with evidence specific to a finding of ineffective assistance and resulting prejudice. *See Massaro v. United States*, 538 U.S. 500, 504-05 (2003) ("When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose."). Criminal defendants often must identify experts or other witnesses, not previously identified or investigated by trial counsel, who can offer exculpatory affidavits or testimony. *See Baumer*, No. 2004-0296-FH, slip. op. at 9 (granting habeas petition where post-conviction counsel demonstrated that trial counsel had inexcusably failed to consult with or call several experts who would have offered exculpatory testimony directly contradicting testimony from prosecution experts); *Rios v. Rocha*, 299 F.3d 796, 812-13 (9th Cir. 2002) (reversing conviction for second-degree murder where trial counsel abandoned a misidentification

defense after interviewing only one of several dozen eyewitnesses and where post-conviction counsel showed that some of these witnesses were willing to testify that defendant did not shoot the victim); *Miller v. Anderson*, 255 F.3d 455, 457 (7th Cir. 2001) (trial counsel's failure to consult with and retain expert prejudicially ineffective in part because post-conviction counsel was able to secure exculpatory testimony from an expert).

For example, as this Court recently acknowledged, "[s]erious deficiencies have been found in the forensic evidence used in criminal trials." *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2537 (2009) (Scalia, J.); *see id.* ("One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases."); *see also* Brandon L. Garrett, *Convicting the Innocent* 90 (2011) ("The analysts did this across a wide range of methods, ranging from serology, in which 58% of the testimony was invalid (67 of 116 trials); to hair comparison, in which 39% was invalid (29 of 75 trials); to bite mark comparison, in which 71% was invalid (5 of 7 trials); to shoe print comparison, in which 17% was invalid (one of six trials); to fingerprint comparison, in which 5% was invalid (1 of 20 trials)."). Criminal defendants challenging trial counsel's effectiveness on their own cannot reasonably be expected to understand increasingly complex forensic science presented at trial, identify potential defects in the science, and retain experts capable of demonstrating those flaws to a court.

Third, these claims must be presented in a way that is procedurally and substantively proper, a task that, again, is difficult without assistance of counsel. While "[a] prisoner not trained in the law or familiar with legal process might reasonably suppose that a heartfelt avowal of his or her veracity, however generalized, is sufficient to secure an evidentiary hearing," *Pham v. United States*, 317 F.3d 178, 186-87 (2d Cir. 2003) (Sotomayor, J., concurring), that is simply not the case. Courts routinely dismiss ineffectiveness claims for a myriad of reasons, including failure to timely raise that claim in the proper forum, *see, e.g.*, *State v. Maciell*, No. 2 CA-CR 2010-0219-PR, 2010 WL 4285650, at *1 (Ariz. Ct. App. Oct. 15, 2010) (unreported); *Cleveland v. State*, 241 P.3d 504, 506-08 (Alaska Ct. App. 2010); *Martin v. State*, No. CR 99-828, 2001 WL 528246, at *1 (Ark. May 17, 2001) (unreported), and failure to plead allegations supporting the claim with sufficient specificity, *see, e.g.*, *State v. Manley*, 664 N.W.2d 275, 289 (Minn. 2003) (unreported in state reporter); *State v. Flores*, No. 2004 AP 1695-CR, 2005 WL 2138805, at *4-5 (Wis. Ct. App. Sept. 7, 2005) (unreported).

Criminal defendants proceeding *pro se* are typically in no position to meet these demands. As this Court has recognized, literacy problems and a general lack of education often leave these defendants "particularly handicapped as self-representatives." *Halbert v. Michigan*, 545 U.S. 605, 621 (2005); *see also id.* (noting that "Sixty-eight percent of the state prison population did not complete high school, and many lack the most basic literacy skills" and that "[s]even out of ten inmates fall in the lowest two out of five levels of

literacy—marked by an inability to do such basic tasks as write a brief letter to explain an error on a credit card bill, use a bus schedule, or state in writing an argument made in a lengthy newspaper article."). A significant portion of these defendants also do not speak English as a first language, creating obvious additional barriers to successfully navigating the legal system. *See, e.g.*, Greenberg, *supra*, at 12-13 (finding that more than one in ten inmates nationally either did not speak English before starting school or is nonliterate in English). Compounding these problems is the fact that a substantial number of defendants suffer from mental illness, *see, e.g.*, Doris J. James & Lauren E. Glaze, Bureau of Justice Statistics, U.S. Dep't of Justice, *Mental Health Problems of Prison and Jail Inmates* 1 (2006), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/mhppji.pdf. ("At midyear 2005 more than half of all prison and jail inmates had a mental health problem."), which can interfere with their ability to assemble a *pro se* defense. *See Halbert*, 545 U.S. at 621 (citing, among other handicaps for criminal defendants proceeding *pro se*, mental health impairments).

B. A Defendant's First Opportunity to Raise a Claim of Ineffective Assistance of Trial Counsel May Not Arise on Direct Appeal

Direct appeal often will not provide criminal defendants with a meaningful opportunity to prosecute claims of ineffective trial counsel because the record on direct appeal is ordinarily limited to the trial record, whereas ineffectiveness claims typically require that defendants investigate and

supplement the trial record with additional evidence showing that trial counsel provided prejudicially deficient assistance. Moreover, several state courts have either counseled against, or otherwise expressly prohibited, criminal defendants from bringing such claims on direct appeal. Accordingly, the first meaningful opportunity to prosecute claims of trial counsel's ineffectiveness will arise, either practically or legally, on post-conviction review.

This Court has previously recognized—at least in the federal system—that defendants often cannot reasonably expect to vindicate their right to trial counsel on direct appeal. In *Massaro v. United States*, a unanimous Court held that federal criminal defendants may bring claims of ineffective assistance of counsel in post-conviction proceedings under 28 U.S.C. § 2255, even if defendants could have, but did not, raise those claims on direct appeal. 538 U.S. at 508-09. Concluding that "in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective assistance," the Court explained:

> When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose. . . . The evidence introduced at trial [] will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis. If the alleged

> error is one of commission, the record may reflect the action taken by counsel but not the reasons for it. . . . The trial record may contain no evidence of alleged errors of omission, much less the reasons underlying them. . . . Without additional factual development, moreover, an appellate court may not be able to ascertain whether the alleged error was prejudicial.

Id. at 504-05 (internal citations omitted); *see also Kimmelman*, 477 U.S. at 378 n.3 (concluding that counsel's failure to litigate a Fourth Amendment claim in state court did not bar federal habeas review of an ineffectiveness claim based on that failure in part because "in general, no . . . meaningful opportunity exists for the full and fair litigation of a habeas petitioner's ineffective-assistance claims at trial and on direct review").

Massaro recognized that claims of ineffective assistance of trial counsel are uniquely complex and not easily resolved simply by reference to the trial record. Unless the error is plain on the face of that record, or a court on direct review permits a defendant to supplement the record, the first meaningful forum to prosecute ineffectiveness claims will be in post-conviction proceedings, and not on direct appeal.

Consistent with the ruling in *Massaro*, the Arizona Supreme Court affirmatively prohibits defendants such as Martinez from raising ineffectiveness claims on direct appeal, requiring instead that they raise such claims in post-conviction proceedings under Rule 32 of the Arizona Rules of Criminal Procedure. *See, e.g., State v. Spreitz*, 202 Ariz. 1, 3, 39 P.3d 525, 527 (Ariz.

2002) (holding that ineffectiveness claims "raised in a direct appeal . . . will not be addressed by appellate courts regardless of merit" to "ensure[ ] criminal defendants a timely and orderly opportunity to litigate ineffectiveness claims" and to "promote[ ] judicial economy by disallowing piecemeal litigation"). Just as this Court recognized in *Massaro*, one impetus for the rule in Arizona is that direct appeal is rarely an adequate forum to prosecute ineffectiveness claims. *See State v. Kiles*, 222 Ariz. 25, 34, 213 P.3d 174, 183-84 (Ariz. 2009) ("Because we cannot consider facts outside the record, our consideration of ineffective assistance of counsel claims on direct appeal would rarely result in reversal. We caution that raising an argument such as this on direct appeal gains very little, but risks a great deal, as the defendant who asks this Court to determine issues of ineffectiveness on the appellate record faces the possibility of later preclusion."). Accordingly, in Arizona, a criminal defendant's first and only opportunity to bring an ineffectiveness claim, and to correct trial errors related to such claims, is on post-conviction review.

For the same reasons, other state courts have concluded that, unless the error is plain on the face of the record on appeal, the more appropriate forum for such claims is post-conviction review. *See, e.g., People v. Lopez*, 42 Cal. 4th 960, 972, 175 P.3d 4 (Cal. 2008) ("[E]xcept in those rare instances where there is no conceivable tactical purpose for counsel's actions, claims of ineffective assistance of counsel should be raised on habeas corpus, not on direct appeal."); *Wuornos v. State*, 21 Fla. L. Weekly S202, 676 So. 2d 972, 974 (Fla. 1996) (holding that ineffectiveness claims are not

cognizable on direct appeal, unless the claim is obvious on the existing record); *State v. Picotte*, 416 N.W.2d 881, 881-82 (S.D. 1987) (unreported in state reporter) (same); *cf. Dodson v. State*, 326 Ark. 637, 642, 934 S.W.2d 198, 201 (Ark. 1996) (holding that such claims may be considered on direct appeal, but only if presented to the trial court first in a hearing on a motion for retrial). In these circumstances, as a practical matter, a defendant's first meaningful opportunity to bring a claim of ineffective assistance of trial counsel is on post-conviction review.

C. Counsel Is Required for First-Tier Review of Ineffective Assistance of Trial Counsel Claims, Even if Such Review Occurs Outside of Direct Appellate Review

Because counsel is necessary to assist in identifying and prosecuting claims of ineffective assistance of trial counsel, and because the first opportunity to present such claims may not occur on appellate review, defendants have a constitutional right to counsel when such first-tier review occurs post-conviction. This Court has already recognized the often critical role of post-conviction counsel in prosecuting claims of ineffective assistance of counsel. As explained in *Kimmelman*:

> Because collateral review will frequently be the only means through which an accused can effectuate the right to counsel, restricting the litigation of some Sixth Amendment claims to trial and direct review would seriously interfere with an accused's right to effective representation. *A layman will ordinarily be*

> *unable to recognize counsel's errors and to evaluate counsel's professional performance; consequently a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, usually when he consults another lawyer about his case.*

477 U.S. at 378 (emphasis added) (internal citations omitted); *see id.* ("Indeed, an accused will often not realize that he has a meritorious ineffectiveness claim until he begins collateral review proceedings, particularly if he retained trial counsel on direct appeal."); *see also English*, 146 F.3d at 1263 (relying on *Kimmelman* to hold that a defendant's failure to raise an ineffective assistance of counsel claim on direct review will not bar federal habeas review unless state procedures "(1) allow[] petitioner an opportunity to consult with separate counsel on appeal in order to obtain an objective assessment of trial counsel's performance and (2) provid[e] a procedural mechanism whereby a petitioner can adequately develop the factual basis of his claims of ineffectiveness").

As the Court's opinion in *Kimmelman* suggests, post-conviction counsel will often serve as the sole means by which a defendant may discover that trial counsel acted incompetently. Conversely, absent an opportunity to consult with counsel, a defendant proceeding *pro se* will ordinarily be unable to identify the deficient trial performance that deprived him of his constitutional right to a fair trial. And, as *Halbert* suggests, even if a defendant proceeding *pro se* were able to identify trial counsel's ineffectiveness, he or she would be ill-equipped to actually prosecute such claims on first-tier review. *See Halbert*, 545 U.S. at 620-21;

cf. State v. Lopez, 156 N.H. 193, 198, 931 A.2d 1186, 1191 (N.H. 2007) ("[W]e have no reason to believe that defendants pursuing [post-conviction] review in this court are better equipped to represent themselves than the defendants described in the *Halbert* opinion.").

A survey of case law supports this Court's understanding that assistance of counsel is critical to bringing a claim of ineffective assistance of trial counsel. For example, of 222 successful state court claims between 1984 and 2003 alleging multiple instances of deficient trial performance, only one claim involved a defendant proceeding without counsel's assistance. This survey suggests that the assistance of counsel in post-conviction proceedings is a decisive factor in determining a defendant's success on the merits. For these reasons, and for reasons more fully explained in Petitioner's Brief, *see* Brief for Petitioner at Argument I.A, *Martinez v. Ryan*, No. 10-1001 (Aug. 4, 2011), the constitutional right to counsel on first-tier review of a claim of ineffective trial counsel, even if that occurs outside of appellate review, is critical to protect a defendant's constitutional right to a fair trial and to safeguard the integrity of the judicial process.

CONCLUSION

In light of *Kimmelman*, *Massaro*, and *Halbert*, as well as substantial evidence that ineffective trial counsel leads to wrongful convictions and that defendants proceeding *pro se* are particularly ill-suited to identify and prosecute ineffectiveness claims, the Innocence Network joins with Petitioner Luis Martinez and asks that this Court

affirm the constitutional right of defendants to counsel at the first opportunity to pursue such claims.

Respectfully submitted,

JAMES P. ROUHANDEH,
Counsel of Record
REBECCA WINTERS
MICAH J. COGEN
KATHERINE A. MARSHALL
ALAN J. TABAK
DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, New York 10017
(212) 450-4000
rouhandeh@davispolk.com .

KEITH A. FINDLEY
PRESIDENT
THE INNOCENCE NETWORK
University of Wisconsin
Law School
975 Bascom Mall
Madison, Wisconsin 53706
(608) 262-4763

Counsel for Amicus Curiae

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 10-1001

In The Supreme Court of the United States

LUIS MARIANO MARTINEZ,

PETITIONER,

v.

CHARLES L. RYAN, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE STATES OF WISCONSIN, ALABAMA, COLORADO, DELAWARE, HAWAII, IDAHO, INDIANA, LOUISIANA, MAINE, MARYLAND, MONTANA, NEBRASKA, NEW MEXICO, NORTH DAKOTA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WYOMING, AS *AMICI CURIAE* SUPPORTING RESPONDENT

J.B. VAN HOLLEN
Attorney General of Wisconsin
WARREN D. WEINSTEIN*
Assistant Attorney General
weinsteinwd@doj.state.wi.us
**Counsel of Record*
REBECCA RAPP ST. JOHN
Assistant Attorney General
Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9444
(608) 266-9594 (Fax)
**Counsel of Record*

[Additional Counsel Listed on Inside Cover]

ADDITIONAL COUNSEL FOR AMICI CURIAE

Luther Strange
Attorney General of Alabama
Office of the Attorney General
501 Washington Avenue
P.O. Box 300152
Montgomery, AL 36130-0152

John W. Suthers
Attorney General of Colorado
Colorado Department of Law
1525 Sherman Street
Denver, CO 80203

For the State of Delaware
Joseph R. Biden, III
Attorney General of Delaware
820 N. French Street
Wilmington, DE 19801

David M. Louie
Attorney General of Hawaii
425 Queen Street
Honolulu, HI 96813

Lawrence G. Wasden
Idaho Attorney General
P.O. Box 83720
Boise, ID 83720-0010

Gregory F. Zoeller
Attorney General of Indiana
IGC-South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204

Douglas F. Gansler
Attorney General of Maryland
200 Saint Paul Place
Baltimore, MD 21202

Steve Bullock
Montana Attorney General
Office of the Attorney General
P.O. Box 201401
Helena, MT 59620-1401

Jon Bruning
Attorney General for the State
of Nebraska
Nebraska Department of Justice
2215 State Capitol Bldg.
P.O. Box 98920
Lincoln, NE 68509-8920

Gary K. King
Attorney General of New Mexico
P.O. Drawer 1508
Santa Fe, NM 87504-1580

Wayne Stenehjem
Attorney General of North
Dakota
600 E. Boulevard Avenue
Bismarck, ND 58505-0040

Peter F. Kilmartin
Attorney General of Rhode
Island
150 South Main Street
Providence, RI 02903

James D. "Buddy" Caldwell
Louisiana Attorney General
Louisiana Department of Justice
P.O. Box 94005
Baton Rouge, LA 70804-9005

William Schneider
Attorney General of Maine
Six State House Station
Augusta, ME 04333-0006

Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, TX 78711-2548

Mark L. Shurtleff
Utah Attorney General
Utah State Capitol, Suite #230
P.O. Box 142320
Salt Lake City, UT 84114-2320

STATE OF VERMONT
William H. Sorrell
Attorney General
109 State Street
Montpelier, VT 05609-1001

Alan Wilson
Attorney General of
South Carolina
P.O. Box 11549
Columbia, SC 29211

Marty J. Jackley
Attorney General
State of South Dakota
1302 E. Highway 14, Suite I
Pierre, SD 57501-8501

Robert E. Cooper, Jr.
Office of the Attorney General
P.O. Box 20207
Nashville, TN 37202-0207

Kenneth T. Cuccinelli, II
Attorney General of Virginia
Office of the Attorney General
900 East Main Street
Richmond, VA 23219

Rob McKenna
Attorney General of Washington
1125 Washington Street, SE
P.O. Box 40100
Olympia, WA 98504-0100

Gregory A. Phillips
Attorney General of Wyoming
Office of the Attorney General
123 State Capitol
Cheyenne, WY 82002

QUESTION PRESENTED

Whether a defendant in a state criminal case who is prohibited by state law from raising on direct appeal any claim of ineffective assistance of trial counsel, but who has a state-law right to raise such a claim in a first collateral proceeding, has a federal constitutional right to effective assistance of first collateral-review-counsel specifically with respect to his ineffective-assistance-of-trial-counsel claim.

TABLE OF CONTENTS

QUESTION PRESENTED i

INTEREST OF AMICI CURIAE 1, 2, 3

SUMMARY OF ARGUMENT 3, 4, 5

ARGUMENT 5

I. PETITIONER IS SEEKING A NEW RIGHT TO COLLATERAL-REVIEW-COUNSEL, NOT AN EXCEPTION TO THE RULE THAT NO SUCH RIGHT EXISTS 5

A. THERE IS NO PRINCIPLED WAY TO LIMIT PETITIONER'S ARGUMENT TO INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIMS. 6

B. THERE IS NO PRINCIPLED WAY TO LIMIT THE RIGHT TO COLLATERAL-REVIEW-COUNSEL TO A SINGLE COLLATERAL REVIEW. 7

C. THERE IS NO PRINCIPLED WAY TO LIMIT PETITIONER'S ARGUMENT TO CLAIMS ALREADY BEING PURSUED. 11

II. CREATING A RIGHT TO COLLATERAL-REVIEW-COUNSEL WOULD HINDER DEFENDANTS' ABILITY TO RECEIVE QUALITY REPRESENTATION AT TRIAL AND ON DIRECT APPEAL..... 12

III. THIS COURT'S PRECEDENTS TARGET RESOURCES TO TRIAL AND DIRECT APPEAL AND DO NOT SUPPORT CREATING THE RIGHT TO COLLATERAL-REVIEW-COUNSEL PETITIONER SEEKS..... 17

IV. PETITIONER'S FAIRNESS CONCERNS ARE OVERBLOWN AND DO NOT PROVIDE A BASIS FOR CREATING A RIGHT TO COLLATERAL-REVIEW-COUNSEL. 21

V. IF PETITIONER PREVAILS, ALMOST ALL STATES AND THE FEDERAL CRIMINAL SYSTEM WILL SEE A CHANGE IN THEIR PROVISIONS FOR APPOINTMENT OF COUNSEL FOR COLLATERAL PROCEEDINGS AND MOST LIKELY WILL EXPERIENCE A SIGNIFICANT INCREASE IN CRIMINAL CASELOAD. 24

A. CONSIDERATION OF HOW THE RIGHT TO COLLATERAL-REVIEW-COUNSEL WOULD AFFECT THE STATES UNDERSCORES THE MAGNITUDE OF WHAT PETITIONER SEEKS. 24

B. WISCONSIN'S CURRENT APPELLATE CASELOAD INDICATES A SIGNIFICANT INCREASE IN CRIMINAL APPELLATE LITIGATION. 29

VI. PETITIONER'S PROPOSED NEW RULE WILL HAVE A DISPROPORTIONATE EFFECT ON CAPITAL CASES. 34

CONCLUSION 39

CASES CITED

Alabama v. Shelton,
535 U.S. 654 (2002) 33

Beard v. Kindler,
130 S. Ct. 612 (2009) 37

Bonin v. Vasquez,
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556 N.W.2d 136
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131 S. Ct. 1120 (2011) 36, 37

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INTEREST OF AMICI CURIAE

This case implicates several important interests of the States that have signed on to this amicus brief. Those interests include the finality of state court convictions, States' ability to develop and carry out procedures for collateral challenges without undue federal interference, and States' discretion to target criminal justice resources in ways that most effectively insure that the guilty are convicted and the innocent are not.

The States have carefully developed rules and procedures for convicted defendants to raise collateral challenges, in the shadow of decisions like *Pennsylvania v. Finley*, 481 U.S. 551 (1987), where this Court held that there is no right to collateral-review-counsel. Creation of the right to collateral-review-counsel Petitioner proposes would upset States' collateral procedures by effectively overruling *Finley*.

A decision in Petitioner's favor would undermine the finality of state convictions, something in which States have a keen interest. It would open the door for what the Ninth Circuit has called an "infinite continuum" of collateral attacks. *Bonin v. Vasquez*, 999 F.2d 425, 430 (9th Cir. 1993). And it would create a way in capital States for defendants sentenced to death to delay their punishment, potentially indefinitely.

Creation of the right to collateral-review-counsel Petitioner proposes would also interfere with States' ability to target limited criminal justice resources where they will be the most effective in providing fair, constitutional procedures at the trial court and direct appeal levels. States would lose the discretion they currently have to determine whether and when to appoint collateral-review-counsel. They would have to furnish collateral-review-counsel, possibly in all collateral cases. They would also have to furnish the courts and prosecutors to handle the ineffective assistance of collateral-review-counsel claims that would inevitably follow.

Many States are in economic crisis and are not in a position to provide additional resources to furnish the right to collateral-review-counsel. They would be forced to divert resources from trials and direct appeals to collateral proceedings, despite this court's repeated recognition that trials and direct appeals play a significant role in the fact-finding process before convictions are final that collateral proceedings do not. *See Evitts v. Lucey*, 469 U.S. 387 (1985); *Finley*, 481 U.S. at 556-57; *Douglas v. California*, 372 U.S. 353 (1963). The likely result is that collateral challenges will increase and the cost of those challenges will increase while providing no additional overall increase in the correctness of validity of state court proceedings.

These interests, coupled with a belief that this court's precedent does not support Petitioner's argument, lead Amici to urge this Court to reject

Petitioner's invitation to create a right to collateral-review-counsel.

SUMMARY OF ARGUMENT

Petitioner seeks a much broader right to collateral-review-counsel than he acknowledges. He is effectively seeking to overturn *Finley*, in which this Court held that there is no such right. He advocates for a right to collateral-review-counsel that could not be limited to ineffective-assistance-of-trial-counsel claims and that could lead to a never-ending chain of collateral proceedings.

The ultimate effect of a decision in Petitioner's favor could be a lessening of the quality of representation defendants receive at trial and on direct appeal. States, which are in economic crisis, may have to draw upon resources from the trial and appellate levels to furnish the right to collateral-review-counsel. They would no longer have discretion to choose when to appoint collateral-review-counsel or how to best distribute criminal justice resources.

This court has always based the right to counsel on the importance of trial and direct appeal to the fact-finding process before convictions are final. *See Evitts*, 469 U.S. 387; *Douglas*, 372 U.S. 353. It has not extended the right to counsel to collateral proceedings precisely because such proceedings are not part of that process. *Finley*, 481 U.S. at 556-57. This court's concerns about ensuring that all

defendants have full access to the fact-finding process before convictions are final are not present here, anymore than they are when litigants bring a range of other claims in collateral proceedings that cannot be brought on direct appeal.

The scope of what Petitioner seeks is underscored by a consideration of how States would be affected by a decision in Petitioner's favor. Amici provide a survey of state collateral procedures and rules concerning the appointment of counsel and discuss how States would be affected by a decision in Petitioner's favor. Of particular note is how the States that always provide counsel to pursue ineffective-assistance-of-trial-counsel claims would be affected. These States already provide what Petitioner proposes. But they would be faced with the possibility of an "infinite continuum" of collateral litigation, as litigants challenge the effectiveness of tier-after-tier of collateral-review-counsel.

Statistics from Wisconsin hint at the amount of litigation that would be generated from the right to collateral-review-counsel Petitioner proposes. Wisconsin allows defendants to raise ineffective assistance of trial counsel claims on direct appeal. Approximately 25% of Wisconsin appellate courts' criminal case load concerns the effectiveness of counsel in collateral proceedings despite the opportunity to present ineffective-assistance-of-trial-counsel claims on direct appeal. These statistics would increase if litigants were then able to

challenge the effectiveness of collateral-review-counsel beyond the first collateral proceeding.

The effects of a decision in Petitioner's favor could be more pronounced in capital States. Litigants facing the death penalty have an incentive to delay punishment for as long as possible. Creation of the right to collateral-review-counsel Petitioner proposes—and the possibility of an "infinite continuum" accompanying it—would provide such litigants a way of doing just that.

ARGUMENT

I. PETITIONER IS SEEKING A NEW RIGHT TO COLLATERAL-REVIEW-COUNSEL, NOT AN EXCEPTION TO THE RULE THAT NO SUCH RIGHT EXISTS.

This Court held in *Douglas v. California*, 372 U.S. 353 (1963), that defendants have a right to counsel in a first appeal as of right. It refused to extend the right to collateral proceedings in *Pennsylvania v. Finley*, 481 U.S. 551, 559 (1987).

Without acknowledging *Finley*, Petitioner claims that he had a right to counsel in Arizona's collateral proceeding because it was his first opportunity to raise an ineffective-assistance-of-trial-counsel claim. He proposes a constitutional right to collateral-

review-counsel for ineffective-assistance-of-trial-counsel claims.

But, when Petitioner's argument is taken to its logical conclusion, it becomes apparent that the right to collateral-review-counsel could never be limited. The right would, as the court of appeals recognized, "swallow the general rule" that there is no right to collateral-review-counsel. *Martinez v. Schriro*, 623 F.3d 731, 742 (9th Cir. 2010).

A. THERE IS NO PRINCIPLED WAY TO LIMIT PETITIONER'S ARGUMENT TO INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIMS.

Petitioner's proposed rule cannot be limited to the right to collateral-review-counsel for ineffective-assistance-of-trial-counsel claims that cannot be raised on direct appeal. There are other claims that cannot be raised on direct appeal including:

- Claims involving evidence that is not discovered until after direct appeal.

- *Brady*[1] violation claims that do not come to light until after direct appeal.

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[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

- Claims based on DNA and other scientific advancements that occur after direct appeal.[2]

- Claims that require fact-finding, in States that prohibit such fact-finding on direct appeal.

- Claims based on rights that are recognized and made retroactive after direct appeal.

- Ineffective assistance of appellate counsel claims.

There is no principled basis for recognizing the rule Petitioner proposes but not these other claims. The other claims can be just as important for avoiding unfair or wrongful convictions as ineffective assistance of trial counsel claims.[3] Further, the other claims can be just as difficult to pursue as ineffective assistance of trial counsel claims and often require the same type of evidentiary hearings.

B. THERE IS NO PRINCIPLED WAY TO LIMIT THE RIGHT TO COLLATERAL-REVIEW-COUNSEL TO A SINGLE COLLATERAL REVIEW.

Petitioner's rationale paves the way for a never-ending series of collateral attacks in which the effectiveness of the first collateral-review-counsel is

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[2] *See e.g., District Attorney's Office For The Third Judicial District v. Osborne*, 557 U.S. ___, 129 S. Ct. 2308 (2009).

[3] *See, e.g.*, Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 Marq. L. Rev. 591 (Winter 2009).

challenged in a second collateral proceeding, the effectiveness of second collateral-review-counsel is challenged in a third collateral proceeding, and so on.

The Ninth Circuit discussed the possibility of a never-ending series of ineffective-assistance-of-collateral-review-counsel claims when rejecting a claim similar to Petitioner's:

> The actual impact of such an exception would be the likelihood of an infinite continuum of litigation in many criminal cases. If a petitioner has a Sixth Amendment right to competent counsel in his or her first state postconviction proceeding because that is the first forum in which the ineffectiveness of trial counsel can be alleged, it follows that the petitioner has a Sixth Amendment right to counsel in the second state postconviction proceeding, for that is the first forum in which he or she can raise a challenge based on counsel's performance in the first state postconviction proceeding. . . . Because any Sixth Amendment violation constitutes cause, *McCleskey*, 499 U.S. at ----, 111 S. Ct. at 1470, federal courts would never be able to avoid reaching the merits on any ineffective-assistance claim, regardless of the nature of the proceeding in which counsel's

> competence is alleged to have been defective. As a result, the "exception" would swallow the rule. To obviate such an absurdity, we hold that the protections of the Sixth Amendment right to counsel do not extend to either state collateral proceedings or federal habeas corpus proceedings.

Bonin v. Vasquez, 999 F.2d 425, 429-30 (9th Cir. 1993)(citations omitted).

Petitioner claims that such a hall of mirrors is an illusion. But he does not provide any meaningful basis for distinguishing between ineffective-assistance-of-trial-counsel claims and ineffective-assistance-of-collateral-review-counsel claims (or suggest, as such a distinction would almost certainly require, that a litigant would not have a right to effective counsel at the collateral stage).

Petitioner claims that a defendant's "first post-conviction counsel could not be ineffective, under *Smith v. Robbins*, 528 U.S. 259, 285-86 (2000), unless his or her deficient performance resulted in prejudice" (Petitioner's Br. at 29-30). *Robbins* is not about *Strickland*'s[4] prejudice standard nor the right to collateral-review-counsel. The right to counsel to pursue an ineffective-assistance claim does not depend on whether the claim would succeed. Indeed, tying the appointment of counsel to such vetting is

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[4] *Strickland v. Washington*, 466 U.S. 668 (1984).

precisely what this Court rejected in *Douglas*, 372 U.S. at 354-55, and *Halbert v. Michigan*, 545 U.S. 605, 617-18 (2005).

Petitioner claims that "it is unlikely in the extreme that any defendant could work his way through more than two tiers of State post-conviction review without running afoul of state and federal statutes of limitations" (Petitioner's Br. at 32). He provides no empirical support for this statement. If state statutes of limitations are like the federal statute of limitation in 28 U.S.C. § 2244(d)(1), they are tolled during the pendency of "any properly filed . . . post-conviction or other collateral review." 28 U.S.C. § 2244(d)(2). A statute of limitations that runs only between the various tiers would do little to stem the "infinite continuum of litigation in many criminal cases" about which the Ninth Circuit warned. *Bonin*, 999 F.2d at 429. A petitioner who diligently files a new petition alleging ineffective assistance of the next tier counsel within two or three months of a previous final determination could go through four to six tiers before a one-year limitation period runs.

Petitioner also claims that rules against successive petitions will curb litigation. But such limitations would not be effective either. Consider federal criminal process. Congress placed stringent restrictions on second or successive motions filed pursuant to 28 U.S.C. § 2255. 28 U.S.C. § 2255(h). Adoption of Petitioner's position here will require counsel for § 2255 motions, and the performance of

those counsel will give rise to claims of ineffective assistance of § 2255 counsel. *Evitts*, 469 U.S. 395-96. If Petitioner has a constitutional right to § 2255 counsel, § 2255(h) would seem to be unconstitutional, running, as it does, into the same problem this case presents. It would eliminate a forum for presenting ineffective assistance of constitutionally mandated counsel claims except in those very narrow circumstances set out in § 2255(h)(1) and (2). The effect of a right to collateral-review-counsel would be similar on the States.

Without any principled basis for limiting the right to collateral-review-counsel to one or two tiers, the only way to curtail the "infinite continuum" of ineffective-assistance-of-collateral-review-counsel claims would be to arbitrarily say "it stops here." If that is the choice, then amici urge this court to keep the line where it has been since *Finley* was decided twenty-four years ago. That, after all, is the line around which States have developed their current collateral procedures.

C. THERE IS NO PRINCIPLED WAY TO LIMIT PETITIONER'S ARGUMENT TO CLAIMS ALREADY BEING PURSUED.

This Court has emphasized that counsel is important not just for pursuing claims, but for

everything that comes before—going through the record, knowing procedural rules, and deciding what, if any, claims to raise. *See Halbert*, 545 U.S. at 621-22; *Evitts*, 469 U.S. at 396-97. From this, litigants would not only have the right to collateral-review-counsel to pursue claims but also the right to collateral-review-counsel to determine whether to raise claims at all and for help bringing a collateral proceeding. But how would a defendant obtain counsel in a collateral proceeding? A defendant must file something pro se to trigger appointment of counsel. Most States currently follow this model statutorily. *See* Argument V.A., *infra*. By providing counsel after a judicial screening or at the point a hearing becomes necessary, States currently provide a safety net to protect the important role collateral proceedings play in the justice system. These statutory provisions are not disadvantaged by the repetitive nature a constitutional right would require. Petitioner's proposed rule provides little gain over the States' current approach.

II. CREATING A RIGHT TO COLLATERAL-REVIEW-COUNSEL WOULD HINDER DEFENDANTS' ABILITY TO RECEIVE QUALITY REPRESENTATION AT TRIAL AND ON DIRECT APPEAL.

Petitioner and his amici claim that the right to collateral-review-counsel to pursue his proposed rule

is essential to preserving the right to trial counsel. They do not take into account how the right would be paid for. Funding for collateral-review-counsel would likely come from the same pot used to pay for criminal defense attorneys at the more critical stages of trial and direct appeal.

United States Attorney General Eric Holder emphasized the lack of resources for criminal defense attorneys in remarks the Innocence Network quotes:

> As we all know, public defender programs are too many times under-funded. Too often, defenders carry huge caseloads that make it difficult, if not impossible, for them to fulfill their legal and ethical responsibilities to their clients. Lawyers buried under these caseloads often can't interview their clients properly, file appropriate motions, conduct fact investigations, or spare the time needed to ask and apply for additional grant funding.

Eric H. Holder, Jr., U.S. Attorney General, Remarks at the Dept. of Justice Nat'l Symposium on Indigent Defense 8-9 (Feb. 18, 2010) (transcript available at http://www.ojp.usdoj.gov/BJA/topics/inddef_index.html.)(last visited Sept. 2, 2011).

A variety of organizations, including the Innocence Network, have identified a lack of resources for trial-level criminal defense attorneys

as a major cause of wrongful convictions.[5] The Innocence Network hammers on this in its amicus brief (Innocence Network Amicus Br. at 7-10).

In an ideal world, States would be able to provide additional resources to supply defendants with collateral-review-counsel. But State budgets are not ideal. States currently face unprecedented budget shortfalls and are already making difficult spending cuts.[6] Even if they wanted to provide resources to meet the additional needs that a right to collateral-review-counsel would create, it is unclear if they could.

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[5] *See 'McJustice'—The Crisis Of Indigent Defense In America*, Innocence Blog (July 15, 2008, 4:10 p.m.), http://www.innocenceproject.org/Content/McJustice__the_crisis_of_indigent_defense_in_America.php, (last visited Sept. 2, 2011); Jeff Billington, *Michigan Ranks 44th in the Nation for Criminal Defense Spending; So Called 'McJustice' System Puts Communities at Risk*, http://www.nlada.org/Defender/Defender_Evaluation/Michigan_Evaluation (last visited Sept. 2, 2011).

[6] *See* Elizabeth McNeil, Phil Oliff and Nicholas Johnson, *States Continue To Feel Recession's Impact*, Center on Budget and Policy Priorities (June 17, 2011) http://www.cbpp.org/cms/?fa=view&id=711 (last visited Sept. 2, 2011); Nicholas Johnson, Phil Oliff and Erica Williams, *An Update on State Budget Cuts*, Center on Budget and Policy Priorities (Feb. 9, 2011), http://www.cbpp.org/cms/index.cfm?fa=view&id=1214 (last visited Sept. 2, 2011); Tracy Gordon, *State Budget Crisis*, Brookings Institution, research and commentary (July 22, 2011), http://www.brookings.edu/topics/state-budget-crisis.aspx (last visited Sept. 2, 2011).

If a right to collateral-review-counsel is created, most likely the public defender offices will be stretched even thinner, as they struggle to meet the increased need such a right would create. The impact would be particularly devastating because, as explained above, the right to collateral-review-counsel would be much broader and more extensive than Petitioner acknowledges.

The problem of limited resources is compounded by the fact that States would not only have to provide collateral-review-counsel. They would also have to provide additional court and prosecutor resources to handle the ineffective-assistance-of-collateral-review-counsel claims that a right to collateral-review-counsel would inevitably spawn. These entities are as important as defense attorneys in ensuring that defendants receive fair trials.[7]

From these realities comes a somewhat counterintuitive result. Creating a right to collateral-review-counsel would not lead to more legal representation for criminal defendants, but more diluted representation. It would direct resources away from trial and direct appeal and divert them to a possibly never-ending series of collateral proceedings. Such dilution would be particularly troubling because, as this Court has recognized, the trial and direct appeal levels are

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[7] Gershowitz, Adam M. and Killinger, Laura R., *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 Northwestern University Law Review 261, n.26-30 (2011).

integral to the truth-seeking function in a way that collateral proceedings are not. *See Evitts*, 469 U.S. at 399-400; *Finley*, 481 U.S. at 556-57. And the proposed rule would add little in view of the statutory landscape already in effect.

Ultimately, the best way to protect defendants from being wrongfully convicted is not to create a new right to collateral-review-counsel, but to target the right to counsel where it is most needed—at the more critical stages of trial and direct appeal.

States would still be free to appoint collateral-review-counsel for all or some litigants. But they would not have to provide collateral-review-counsel to all litigants, even serial litigators with obviously meritless claims. States could weigh the costs and benefits of appointing collateral-review-counsel and consider the effects on trial and appellate representation. They would not be put in a position of having to limit collateral remedies, either completely or by imposing statutes of limitations, to avoid the drain on resources that a right to collateral-review-counsel would cause.

III. THIS COURT'S PRECEDENTS TARGET RESOURCES TO TRIAL AND DIRECT APPEAL AND DO NOT SUPPORT CREATING THE RIGHT TO COLLATERAL-REVIEW-COUNSEL PETITIONER SEEKS.

This Court has always tied the right to counsel to direct appeal, thus targeting resources to the most important phases of the criminal justice process.

When this court recognized the right to counsel on direct appeal in *Douglas*, it implicitly recognized that a direct appeal is still part of the fact-finding process, describing a defendant on direct appeal as being "burdened by a *preliminary* determination that his case is without merit." *Douglas*, 372 U.S. at 358 (emphasis added). It held that depriving indigent defendants of "the benefit of counsel's examination into the record, research of the law, and marshalling of arguments" on a party's behalf would unconstitutionally discriminate against the indigent by denying them a meaningful appeal. *Id.*

This Court, in *Evitts* and *Halbert*, reiterated the importance of direct appellate review in the fact-finding process underlying a defendant's conviction. In *Evitts*, this Court held that the right to counsel on direct appeal includes the right to effective counsel. It noted that "[a] system of appeal as of right is established precisely to assure that only those who

are validly convicted have their freedom drastically curtailed." *Evitts*, 469 U.S. at 399-400.

In *Halbert*, this Court held that defendants have a right to counsel in a discretionary appeal that provides the only opportunity for defendants who plead guilty to get direct appellate review. *Halbert*, 545 U.S. at 619. It distinguished the case from *Ross v. Moffit*, 417 U.S. 600, 609-616 (1974), where it held that defendants did not have a right to counsel to seek discretionary review on direct review in this Court or in a State supreme court, on the ground that the appellate court before it was "an error-correction instance" and "provide[d] the first, and likely the only, direct review the defendant's conviction and sentence will receive." *Id.* at 619.

This Court has conversely noted finality and the significance of appellate review as an error-correction mechanism in the fact-finding process as a basis for *not* recognizing the right to counsel in other collateral proceedings.

In *Finley*, this Court distinguished collateral proceedings from direct appeals on the ground that collateral proceedings are brought after convictions become final. *Finley*, 481 U.S. at 555. Building upon *Ross*, it held: "We think that since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori*, he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process." *Id.* It noted:

> Postconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature. It is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction.

Id. at 556-57(citation omitted).

Underscoring its view that collateral proceedings are not error-correcting in the same way as direct appeals, this Court held in *Murray v. Giarratano*, 492 U.S 1, 10 (1989), that *Finley* applies in capital cases.

This Court's decisions do not support creating the right to collateral-review-counsel. This case is much more like *Finley* and *Ross* than *Douglas*. Petitioner had a trial and direct appeal and his conviction is now final. He had statutorily appointed counsel for a collateral proceeding. He is in no different position than litigants who want to raise claims that, by their nature, cannot be raised on direct appeal. *See* Argument I.A.

Petitioner analogizes his case to *Halbert*, noting that he could not raise his ineffective assistance of trial counsel claim on direct appeal. But *Halbert*, like *Evitts* and *Douglas*, involved a defendant's ability to get *any* appellate review, not a defendant's ability to pursue individual claims in a collateral proceeding.

This difference is critical. If *Halbert* applied any time a defendant could not raise a single claim until a collateral proceeding, it would have effectively overturned *Finley*. This Court never suggested in *Halbert* that it was overturning *Finley sub silencio*.

The Former State Supreme Court Justices, who write in support of Petitioner, emphasize that ineffective-assistance-of-counsel claims require an evidentiary showing that pro se litigants may have difficulty making (Former State Supreme Court Justices Amici Br. at 27). But the fact-finding for ineffective-assistance claims is of a different order than the fact-finding this court sought to protect in *Douglas*. The fact-finding for ineffective-assistance-of-counsel claims does not go to guilt or innocence. It goes tc what counsel did or did not do at trial and implicates a different burden of proof.

Further, it by-passes State created rules established to avoid piece meal litigation. As this Court has recognized, ineffective-assistance-of-counsel claims "can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial." *Harrington v. Richter*, 562 U.S. __, 131 S. Ct. 770, 788 (2011). *Harrington*'s court observation is not limited to the first collateral proceeding.

IV. PETITIONER'S FAIRNESS CONCERNS ARE OVERBLOWN AND DO NOT PROVIDE A BASIS FOR CREATING A RIGHT TO COLLATERAL-REVIEW-COUNSEL.

Petitioner and his amici all make a fairness argument: collateral-review-counsel can help litigants identify, present, and pursue ineffective-assistance-of-trial-counsel claims.

This Court emphasized the benefits of appellate counsel in *Douglas*, *Evitts*, and *Halbert* when recognizing the right to counsel for direct appellate review. *See Halbert*, 545 U.S. at 621; *Evitts*, 469 U.S. at 393; *Douglas*, 372 U.S. at 357-58. But it never recognized the right as required solely because counsel is helpful. It has always tied the right to counsel to the importance of direct appellate review to correct errors before convictions become final. The right to appellate counsel is a means of ensuring that all defendants, rich and poor alike, have "meaningful access" to direct appellate review, *See Douglas*, 372 U.S. at 355, 357-58 (California's law requiring courts to vet defendant's claims before appointing counsel unconstitutionally discriminated against indigents by depriving them of a meaningful appeal).

This Court made it clear in *Ross* that the right to counsel does not depend on whether litigants would benefit from counsel, explaining:

> [T]he fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required. The duty of the State under our cases is . . . only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process.

Ross, 417 U.S. at 616.

The Court could not have ruled the way it did in *Ross*, *Finley*, or *Murray* if the test was whether the right to counsel would be helpful. There would be no limit to the right to counsel if helpfulness is the metric because a litigant will always benefit from counsel.

Petitioner and his amici greatly exaggerate the difficulties facing litigants who want to pursue ineffective-assistance claims. The fact remains, as the Innocence Network notes, that pro se litigants can and do manage to identify, present, and prevail on ineffective-assistance claims (Innocence Network Br. at 4). Some factors work in a pro se litigant's favor. Their pleadings are "liberally construed." *See Estelle v. Gamble*, 429 U.S. 97, 106 (1976). The *Strickland* test for ineffective-assistance-of-trial-counsel claims is well known and the mere mention of "ineffective assistance" focuses a reviewing Court on *Strickland's* well-known two-part test. And ineffective-assistance claims are typically based on

trial-tested facts that litigants should be familiar with. Having sat through the trial, defendants are at least aware of trial counsel's defense and what witnesses counsel presented. This, together with the statutory provisions already existent, provide adequate protection for the role of collateral proceedings without a burden of repeated litigation.

Moreover, even without a right to collateral-review-counsel, States remain free to appoint collateral-review-counsel. In fact, all States but one have a statutory right to collateral-review-counsel in at least some cases or under some circumstances.[8] Leaving the decision of whether and on what basis to appoint collateral-review-counsel to State legislators or courts has the advantage of allowing States to target the appointment of collateral-review-counsel on cases in which it would be the most helpful and in view of scarce resources with which States must contend.

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[8] *See* fn. 12-14, 16.

V. IF PETITIONER PREVAILS, ALMOST ALL STATES AND THE FEDERAL CRIMINAL SYSTEM WILL SEE A CHANGE IN THEIR PROVISIONS FOR APPOINTMENT OF COUNSEL FOR COLLATERAL PROCEEDINGS AND MOST LIKELY WILL EXPERIENCE A SIGNIFICANT INCREASE IN CRIMINAL CASELOAD.

A. Consideration Of How The Right To Collateral-review-counsel Would Affect The States Underscores The Magnitude Of What Petitioner Seeks.

In *Finley*, this Court stated, "States have substantial discretion to develop and implement programs to aid prisoners seeking to secure collateral review." *Finley*, 481 U.S. at 559. *See also District Attorney's Office For The Third Judicial District v. Osborne*, 557 U.S. ___, 129 S. Ct. 2308, 2320 (2009) (A State "has more flexibility in deciding what procedures are needed in the context of postconviction relief.") The States presumably developed their systems after careful deliberation by

Legislatures or through a rulemaking process. As the *Osborne* court pointed out, "[b]y extending constitutional protection to an asserted right . . . we, to a great extent, place the matter outside the arena of public debate and legislative action." *Id.* at 2322 (internal quotation marks omitted). Exercising that flexibility, the States have implemented varied approaches to statutory appointment of counsel for collateral review. Ultimately, as in *Osborne*, "[e]stablishing a freestanding right [to appointed counsel based on the claim] would force [this Court] to act as policymakers." *Id.* at 2323. Such federal interference with the State's substantial discretion is unwarranted.

Currently, three States require raising all ineffective-assistance-of-counsel claims on direct appeal: Michigan, Oklahoma, and Wisconsin. Alabama, permits ineffective-trial-counsel claims to be raised on appeal where the claim can be identified in time to file a motion for a new trial.[9] Hawaii also allows a defendant to assert ineffective-assistance-of-trial-counsel claims on direct appeal.[10] Indiana requires defendants to choose between raising ineffective-assistance-of-trial-counsel claims on direct appeal or in collateral proceedings.[11] These States are already providing constitutionally guaranteed counsel to raise ineffective-assistance-of-trial-counsel claims. The other States generally

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[9] *Ex parte Ingram*, 675 So. 2d 863, 864 (Ala.1996).

[10] *State v. Silva*, 864 P.2d 583, 591-92 (Haw. 1993).

[11] *Woods v. State*, 701 N.E.2d 1208, 1213-20 (Ind. 1998).

require ineffective-assistance claims to be raised in what Petitioner calls a "first tier" collateral proceeding. Of the States besides Michigan, Oklahoma, and Wisconsin, forty-six provide statutory or case law authority to appoint counsel in all or some collateral proceedings. Only one State does not provide for counsel in any collateral proceeding.[12]

Of the other States, twelve States and the District of Columbia[13] provide appointed counsel for all collateral proceedings attacking a conviction for

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[12] Georgia provides no counsel for any case, even in capital cases. *Gibson v. Turpin*, 513 S.E.2d 186 (Ga. 1999).

[13] The States providing appointed counsel for in all cases are: Arizona, Ariz. R. Crim. P. 32.4(c)(1); Alaska, Alaska Stat. Ann. 18.85.100(c) (West 2010); Connecticut, Conn. Gen. Stat. § 51–296(a) (West 2011); *but cf: Small v. State*, 920 A.2d 1024 (Conn. App. 2007); Indiana, Ind. Code § 33-40-1-2 (West 2011); Ind. PC1 (Rule) 1(9)(a); Iowa, Iowa Code Ann. § 822.5 (West 2011); Maine, Me. Rev. Stat. tit. 15, § 2129(1)(B) (West 2011), and Maine R. Crim. P. 69; Maryland, Md. Code Ann., Crim. Proc. § 7-108 (West 2011); Missouri, Mo. Rev. Stat. §§ 547.360(5) and 547.370(1) (West 2000); New Jersey, N.J. Stat. Ann. § 2A:158A-5 (West 2011), and N.J. Ct. R. 3:22-6(a); Oregon, Or. Rev. Stat. § 138.590 (West 2011); Pennsylvania, Pa. R. Crim. P. 904(C) and (H); and Rhode Island, R.I. Gen. Laws Ann. § 10-9.1-5 (2010). Alaska also provides second collateral-review-counsel for ineffective assistance of first collateral-review-counsel claims. The District of Columbia requires appointed counsel in a criminal case to represent the defendant "at every stage, including ancillary matters appropriate to the proceedings." D.C. Code §§ 11-2602, and 2603 (2001); *see also Doe v. United States*, 583 A.2d 670, 674 (D.C. 1990) (holding ancillary proceedings encompasses a motion under D.C. Code § 23-110 (2001), based on ineffectiveness of counsel.)

the first time. So a total of seventeen States provide counsel at the first opportunity to raise ineffective-assistance-of-trial-counsel claims.

Even these States could be affected by the right to collateral-review-counsel Petitioner seeks. Petitioner's claim-based right to counsel would require appointment of counsel for all of the claims listed in Argument I.A. It could also require the appointment of collateral-review-counsel in more than one collateral proceeding.

Twenty-one States[14] provide a limited right to collateral-review counsel. These States provide

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[14]Alabama, Ala. R. Crim. P. 32.7(c) (2011); Colorado, *Silva v. People*, 156 P.3d 1164, 1168 (Colo. 2007); Delaware, Del. Super. Ct. Crim. P. 61(l)(3) and 61(e)(1); Hawaii, Haw. Rev. Stat. § 802-1 (1996); Illinois, 725 Ill. Comp. Stat. 5 Art. 122-1, (2010); Kansas, Kan. Stat. Ann. § 22-4505 (1997); Kentucky, Ky. Rev. Stat. Ann. § 31.110(2)(c) (West 2011); Louisiana, La. Code Crim. Pro. Ann. art. 930.7 (2011); Massachusetts, Mass. R. Crim. P. 30(c)(5) (2009); *Commonwealth v. Conceicao*, 446 N.E.2d 383 (1983); Minnesota, Minn. Stat. § 611.14(2) (2010); Montana, Mont. Code Ann. § 46-21-201(2) (2009); *State Public Defender v. Montana Thirteenth Judicial District*, 2007 MT 333, ¶¶ 3-4, 178 P.3d 693; *Davis v. State*, 2007 MT 207, ¶ 14, 167 P.3d 892; Nebraska, Neb. Rev. Stat. § 29-3001 (2011); *State v. Victor*, 242 Neb. 306 (1993); New Hampshire, *State v. Lopez*, 931 A.2d 1186 (N.H. 2007); *State v. Hall*, 908 A.2d 766 (N.H. 2006); New Mexico, N.M. R. Ann. § 5-802(E)(2) (2011); New York, *People v. Richardson*, 603 N.Y.S.2d 700 (N.Y. Sup. 1993); North Dakota, N.D. Cent. Code Ann.§ 29-32.1-06 (2009); *Crumley v. State*, 2000 ND 110, ¶ 11, 611 N.W.2d 165; South Dakota, S.D. Codified Laws § 21-27-4 (2004); *State v. Reed*, 2010 SD 105, 793 N.W.2d 63; Tennessee, Tenn. Code Ann.§ 40-30-107 (2006); Vermont, Vt. Stat. Ann. tit. 13, § 5233(a)(3) (2004); West Virginia,

appointed counsel based on either court discretion or on some statutory criteria.[15] In these States, Petitioner's claim-based rule could require a change to non-discretionary appointment in almost all cases.

States with capital punishment are a special category. Fourteen States[16] provide at least one and

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Mugnano v. Painter, 575 S.E.2d 590 (W. Va. 2002). Wisconsin provides first collateral-review-counsel as a matter of discretion despite providing a direct appeal opportunity to raise ineffective-trial- counsel claims. Wis. Stat. § 974.06(3)(b) (2009-10).

[15] In keeping with the wide discretion recognized in *Pennsylvania v. Finley*, 481 U.S. 551 (1987), the criteria for appointment vary greatly in these States. For example, some States leave complete discretion to the judge hearing the collateral petition. Some provide counsel in all cases which survive an initial judicial screening. Some provide counsel in every case in which a hearing is held. Some provide for discretionary appointment of counsel only if a hearing is held.

[16] Arkansas, Ark. R. Crim. P. 37.3(b) and 37.5(b); California, *In re Sanders*, 981 P.2d 1038, 1051 (Cal. 1999); Florida, *Graham v. State*, 372 So. 2d 1363 (Fla. 1979); Idaho, I.C.R. 44.2(1), I.C. Ann. § 19-4904 (2011); *Gonzales v. State*, 254 P.3d 69, 72-73 (Idaho Ct. App. 2011) (If an applicant alleges facts that raise the possibility of a valid claim, the district court should appoint counsel in order to give the applicant an opportunity to work with counsel and properly allege the necessary supporting facts.); Mississippi, *Jackson v. State*, 732 So. 2d 187, 191 (Miss. 1999); Nevada, Nev. Rev. Stat. §§ 34.750 and 34.820 (West 2010); North Carolina, N.C. Gen. Stat. Ann. §15A-1420(c)(4) (2009); Ohio; Ohio Rev. Code Ann. §§ 120.16 and 2953.21(I) (West 2011); South Carolina , S.C. Code Ann. §§17-27-60 and 17-27-160 (West 2010), S.C. R. Civ. Pro. 71.1(d), *In Re Stays of Execution in Capital Cases*, 471 S.E.2d 140 (S.C. 1996); Texas, Tex. Code Crim. P. art. 11.07 and 11.071 (2009); Utah, Utah Code Ann. §§ 78B-9-109 and 78B-9-202 (West 2011) Virginia, Va. Code Ann. §§ 19.2-163.7 and 19.2-163.8 (West 2011); Washington, Wash. Rev. Code Ann.

sometimes two appointed counsel for capital cases. So for these States, capital cases are treated the same as the twelve States that provide counsel for all first-time collateral proceedings. The non-capital cases in most of these States fall into the limited-right category.[17] For non-capital cases, these States will suffer the same fate as the twenty-one States who statutorily provide a limited right to appointed counsel for all cases.

B. WISCONSIN'S CURRENT APPELLATE CASELOAD INDICATES A SIGNIFICANT INCREASE IN CRIMINAL APPELLATE LITIGATION.

Using data from the Wisconsin Court System and Department of Justice, Wisconsin's experience, if it is typical, demonstrates that almost all States and the federal system can expect a significant increase in their criminal caseloads if defendants have a

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§ 10.73.150 (West 2011); Wyoming, Wyo. Stat. Ann. § 7-14-104(c) (West 2011) (public defender discretion).

The Wyoming Public Defender has discretionary authority to appoint counsel. Wyo. Stat. Ann. 7-6-104(c)(ii). Wyoming states the Public Defender has done so in capital cases. Although the statute appears to allow appointment in non-capital cases, it has not happened to date. Oklahoma provides collateral-review-counsel to death-row inmates despite providing a direct-appeal opportunity to raise ineffective-trial-counsel claims. Okla. Stat. tit. 22, § 1089(B) (West 2011).

[17] Only Ohio provides counsel in all capital cases but does not provide counsel in non-capital cases. Utah provides mandatory paid appointed counsel for capital cases and discretionary pro bono counsel in non-capital cases.

constitutional right to collateral-review-counsel. This data is not published. It is drawn from computer compilations of the record of appeals in the Wisconsin Court of Appeals maintained by the Wisconsin Director of Courts and the Wisconsin Department of Justice's own records. To understand why the data can be reflective of caseloads in the federal system and the various States if Petitioner is successful, a further brief expansion on the Wisconsin system set out above is necessary.

Wisconsin distinguishes between postconviction counsel and appellate counsel. *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 678, 556 N.W.2d 136 (Wis. Ct. App. 1996) (*per curiam*); *see also State ex rel. Smalley v. Morgan*, 211 Wis. 2d 795, 797, 565 N.W.2d 805 (Wis. Ct. App. 1997), *abrogated on other grounds by State ex rel. Coleman v. McCaughtry*, 2006 WI 49, 290 Wis. 2d 352, 714 N.W.2d 900. Postconviction counsel represents a defendant in post-verdict proceedings in the circuit court between the time the circuit court enters a judgment of conviction and the time an appeal commences with the filing of a notice of appeal. Appellate counsel represents a defendant in post-verdict proceedings in the appellate courts following the filing of a notice of appeal. The same lawyer often serves in both capacities. *Rothering*, 205 Wis. 2d at 678 n.4 ("We are aware that often postconviction counsel and appellate counsel are the same person.").

The performance of appellate counsel may be reviewed by filing a state petition for habeas corpus in the Court of Appeals. *State v. Knight*, 484 N.W.2d 540, 544 (Wis. 1992). The only claim cognizable in a *Knight* petition is ineffective assistance of appellate counsel. On the other hand, claims regarding post-conviction counsel must be brought in the trial court via a petition for a writ of habeas corpus or a Wis. Stat. § 974.06 motion. *Rothering*, 556 N.W.2d at 139. Since defendants must provide a "sufficient reason" for not raising ineffective assistance of trial counsel at the first opportunity in the direct appeal, these cases almost always raise a claim of ineffective assistance of "first tier" counsel as a "sufficient reason." *Id.* Both trial-court § 974.06 motions, habeas corpus petitions, and appellate-court *Knight* petitions are "second tier" proceedings as Petitioner uses the term.

The number of *Knight* petitions gives an accurate picture of how many claims of ineffective-assistance-of-appellate counsel are filed. By adding the number of appeals of § 974.06 motions to the number of *Knight* petitions, one can get a fairly accurate picture of how many claims of ineffective-collateral-review-counsel are litigated. The number is lower than the total because some unknown number of § 974.06 motions are filed in the trial court but not appealed. By adding the total of § 974.06 appeals and *Knight* petitions to the number of direct appeals, one gets the total number of appellate cases involving criminal convictions. By comparing these numbers, one can get a good approximation of the

effect on appellate caseload of litigating ineffective-assistance-of-collateral-review-counsel claims in a second-tier proceeding.

The Wisconsin Director of Courts provided the number of direct appeals and the number of § 974.06 appeals handled by the Wisconsin Court of Appeals from January 1, 2006, to August 22, 2011. Unfortunately, the court statistics do not separate *Knight* petitions from other extraordinary writs. But the Department of Justice keeps computer records of the number of *Knight* petitions served on it. Wisconsin used those figures in the calculations that follow.

The total appellate criminal case load (direct appeal, § 974.06 motions and *Knight* petitions) for the period January 1, 2006 to August 22, 2011, was 5,516. In that period the Court of Appeals docketed 4,299 direct appeals. It docketed 1,031 § 974.06 appeals. In that same period, January 1, 2006 to August 22, 2011, the Department was served with 186 *Knight* petitions. The docketed and served appellate cases beyond "first tier review" for the five year period total 1,217. From these figures one can see that for the last five years, second-tier[18] appellate litigation accounted for 22% of Wisconsin's criminal caseload.[19] Stated another way, the appellate caseload for second collateral-review

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[18] The figures include some cases in succeeding tiers for repeated attempts, but those, too, are the inevitable result of a claim-based rule.

[19] 1217÷5516 = 0.2206 x 100 = 22.06%

counsel is 28% of the direct appeal case load.[20] If the Wisconsin experience is typical, and there is no reason to think it is not, at least forty-six States and the federal system that will be required to duplicate Wisconsin's system will experience roughly a 28% increase in cases at the error-correcting appeal level. And this only looks at a second round of collateral review. While this increased caseload may not be a reason to deny a significant constitutional right, in a case of weighing the benefit of the right versus its cost or in deciding where to draw a line to cut off repetitive litigation, these numbers are relevant and compelling.[21]

Creation of the right to collateral-review-counsel Petitioner seeks would likely significantly increase appellate caseloads in all fifty States and the federal criminal system. Such a right would open the floodgates for not only one tier but multiple tiers of ineffective-assistance-of-collateral-review-counsel claims.

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[20] 1217÷4299 = 0.2831 x 100 = 28.31%

[21] *See Alabama v. Shelton*, 535 U.S. 654, 679 (2002) (Scalia, J., dissenting) ("Our prior opinions placed considerable weight on the practical consequences of expanding the right to appointed counsel beyond cases of actual imprisonment. *See, e.g., Scott*, 440 U.S. at 373 (any extension of *Argersinger* would 'impose unpredictable, but necessarily substantial costs on 50 quite diverse States'); *see also Argersinger*, 407 U.S. at 56-62 (Powell, J., concurring in result)(same). Today, the Court gives this consideration the back of its hand.").

VI. PETITIONER'S PROPOSED NEW RULE WILL HAVE A DISPROPORTIONATE EFFECT ON CAPITAL CASES.

Although the instant case is not a capital case, Petitioner's proposed new rule mandating constitutional review of the performance of collateral-review counsel would have a disproportionate impact on capital cases. As noted, see Argument V.A. *ante*, the great majority of States do not automatically provide free counsel to indigent convicts on collateral review in non-capital cases, but virtually every state that has the death penalty does provide free collateral-review counsel to death row inmates.

And there are special and particular problems from Petitioner's proposed rule that would arise in death penalty cases. The Ninth Circuit's aptly characterized concern about an "infinite continuum of litigation," *Bonin*, 999 F.2d at 429, is particularly acute in death penalty cases.

In non-capital cases, Petitioners have an interest in the expeditious resolution of their claims of error, regardless of whether those claims are brought on direct or collateral review. Generally speaking, non-capital prisoners are suffering the punishment that the State has meted out for their crimes during the direct and collateral review processes, and their only hope for relief from that punishment is at the conclusion of the litigation.

In capital cases, by contrast, some—indeed, most—Petitioners have a vested interest in delaying the resolution of their claims. Capital Petitioners *thwart* the imposition of the punishment imposed by the very act of bringing and continuing litigation. And it is precisely those Petitioners who believe that they have the least chance of success on the merits of their claims that have the greatest incentive to litigate for as long as possible, because by doing so, they effectuate their best chance to stymie the States' efforts to carry out the imposed punishment for as long as possible. That is to say, capital inmates with claims they believe to be of little merit continually receive the relief they most fervently seek—and to which they are the least entitled—during the pendency of the litigation; the only risk to capital prisoners who bring claims they believe to be without merit is upon the conclusion of the litigation. Thus, to the extent avenues are available to continue collateral attacks on the judgment or sentence, capital Petitioners without meritorious claims have the greatest incentive to take advantage of those avenues.

Apparently—and appropriately—concerned that this Court might be loathe to adopt a rule that would permit endless litigation of the adequacy of trial counsel (by adopting a rule requiring successive reviews of the adequacy of appellate and collateral-review counsels' attacks on trial counsel), Petitioner seeks to draw an arbitrary line that, not surprisingly, would require the successive review he seeks to bring, but no more. However, the

arguments he offers in support of the line he draws do not bear scrutiny.

First, Petitioner argues that Arizona's relatively strict time limits for bringing collateral review petitions alleging ineffective assistance of counsel render it "virtually inconceivable" that a Petitioner could bring successive petitions challenging prior counsel in a timely manner (Petitioner's Br. at 32-33). However, this Court did not grant review of the instant case in order to announce an Arizona-only rule; indeed, the question presented admits of no such limitation. Rather, the new rule Petitioner proposes would apply equally to all the States, including States that have lengthier or less rigidly defined limitation periods. *See, e.g., Walker v. Martin*, 562 U.S. ___, 131 S. Ct. 1120, 1124-26 (2011). Thus, in many States, a Petitioner would have time to seek repeated successive review of prior collateral-review of counsel's performance. Further, to the extent this Court holds that the right of review of collateral-review counsel's performance is of federal constitutional dimension, many States would likely be loathe to impose a rigid time-bar to such claims, particularly when, as posited, the reason the claim was not brought in the earlier proceeding was because prior collateral-review counsel was ineffective.[22]

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[22] Petitioner posits that "any state would be free, under *McKane v. Durston*, 153 U.S. 684, 687 (1894), to simply prohibit all second or successive post-conviction relief petitions—or to restrict such petitions in the same manner as 28 U.S.C. § 2244(b)." (Petitioner's Br. at 34). This assertion fundamentally misapprehends the dynamic at work in federal

Petitioner further argues that "it is unrealistic to think that many convicted defendants would be able to find a succession of attorneys willing to allege that all previous trial and postconviction counsel were ineffective . . . ." (Petitioner's Br. at 34). California's experience demonstrates that Petitioner's hope is misplaced. It is not only "realistic," it is *routine* in capital cases for subsequent collateral-review counsel to allege that prior collateral-review counsel failed to present available claims. Specifically, it is common for subsequent collateral-review counsel to bring new claims of ineffective assistance of trial counsel that were not brought, or were brought in an allegedly deficient manner, by earlier collateral-review counsel. *See, e.g.*, *Cullen v. Pinholster*, 563 U.S. ___, 131 S. Ct. 1388, 1396-97 (2011) (second state habeas counsel brought a claim of ineffective

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habeas corpus. States are free, consistent with the federal Constitution, to fashion their direct and collateral review procedures in the manner that they best think serves the interests of justice. But Petitioner's proposed rule removes this freedom. This Court should not articulate a rule that would encourage a State to curtail an avenue of review that it might otherwise make available to its citizens in order to thwart meddling by the federal courts that undermine the finality of state court decisions. *Walker v. Martin*, 138 S. Ct. at 1125; *Beard v. Kindler*, 558 U.S. ___, 130 S. Ct. 612, 618 (2009).

assistance of trial counsel that improved upon the claim brought by first state habeas counsel)[23]; *In re Clark*, 855 P.2d 729, 779-80 (Cal. 1993) (discussing the state-law limitations on a California Petitioner arguing that prior state habeas counsel was incompetent). Wisconsin's experience in a system already in keeping with Petitioner's proposed rule is similar. See Argument V.B., *supra*.

Further, Petitioner's entire argument is undermined by his tacit concession that it is safe to assume that second collateral-review-counsel performed competently (Petitioner's Br. at 31). Although Petitioner purports to distinguish the propriety of reviewing the performance of second collateral-review counsel from reviewing the performance of first collateral-review counsel, he provides no basis in reason for the necessary premise that first collateral-review counsel is more likely to overlook claims that Petitioner thinks are very important than second collateral-review counsel.

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[23] Indeed, contrary to Petitioner's skepticism that such is unlikely to ever occur, Pinholster is now pressing his third state petition for a writ of habeas corpus (with the assistance of counsel), asserting an even newer and ostensibly more improved version of the claim of ineffective assistance of trial counsel. See *In re Scott Lynn Pinholster on Habeas Corpus*, California Supreme Court case number S193875, http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1982053&doc_no=S193875 (last visited Sept. 7, 2011).

And if, as will inevitably be argued in some future case, it is alleged that both first and second collateral-review counsel were incompetent, the Petitioner in that future case will make precisely the same argument that Petitioner is making in the instant case, using precisely the same logic. And if Petitioner is correct in the instant case, and he can challenge the competence of his collateral-review counsel in order to force the state court to hear the merits of an otherwise defaulted claim of ineffective-assistance-of-trial counsel, it certainly makes no difference to Petitioner whether he had a single incompetent lawyer on collateral review, or two, or twenty. If, as Petitioner suggests, he has a federal constitutional right to have the performance of habeas counsel reviewed, then there is no basis for reining in the infinite regression of review that such a rule would require.

CONCLUSION

For the reasons stated above, amici curiae States request that this Court affirm the decision below.

Dated this 13th day of September, 2011.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

WARREN D. WEINSTEIN*
Assistant Attorney General

REBECCA RAPP ST. JOHN
Assistant Attorney General

Counsel for Amici Curiae

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9444
(608) 266-9594 (Fax)
weinsteinwd@doj.state.wi.us
**Counsel of Record*